Supreme Court, U.S.
FILED

'98 18 94 MAY 25 1999

No. _____

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In The

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

MICHAEL M. BERGER*
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. (a) May a state court rule, contrary to this Court's holdings in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that landowners who are prevented from improving and using their land for a family home by invalid and unconstitutional land use regulations – found by the court to be invalidly imposed by a government agency *acting without jurisdiction* – may be denied 5th Amendment just compensation for the resulting regulatory taking of their land?

(b) May a state court rule that the supposed "remedy" of landowners subjected to jurisdictionally invalid and unconstitutional regulations is to knuckle under to the unlawful government demands and forego lawful use of their land on pain of losing their right to seek just compensation in court?

2. May a state court rule, contrary to this Court's holdings in *First English*, *Lucas* and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that unconstitutional land use regulations that deny landowners all economically beneficial use of their land for many years do not justify 5th Amendment compensation for a taking if the regulators (who lack jurisdiction to act) can come up with some arguable – albeit invalid – basis for their action?

3. May a state court nullify this Court's holding in *First English* (that the 5th Amendment compels compensation for the period of time *before* a confiscatory regulation is struck down), by ruling that no compensation can ever be constitutionally due until *after* a court invalidates the regulation?

LIST OF PARTIES

In addition to the parties listed in the caption:

John Buckley.*

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* John and Peggy Ann Buckley have divorced since the underlying incidents occurred and have been represented by separate counsel at bench.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Peggy Ann Buckley respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the California Court of Appeal, Second Appellate District, Division Two.

OPINIONS BELOW

The decision under review was filed on Dec. 1, 1998, and is reported as *Buckley v. California Coastal Commn.*, 68 Cal.App.4th 178, 80 Cal.Rptr.2d 562 (1998). (App., p. 1.) Petitions for Rehearing were denied in an unreported order filed Dec. 28, 1998. (App., p. 35.) The California Supreme Court denied review in an unreported order filed Feb. 24, 1999. (App., p. 36.) The trial court's unreported Statements of Decision, filed Nov. 18, 1993 and April 6, 1995, and Judgments, filed Dec. 17, 1993 and July 12, 1995 (after a bifurcated trial), are at App., pp. 38, 47, 45, and 59 respectively.

This was the second round of appeals in this case. Earlier, the Court of Appeal had issued an opinion on Oct. 15, 1997, reported at 68 Cal.Rptr.2d 146. The California Supreme Court granted review on Jan. 28, 1998 and then, on July 8, 1998, transferred the matter back to the Court of Appeal with directions to reconsider it in light of the Supreme Court's recent decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006 (1998) (App., p. 37).[1]

JURISDICTION

This case arises from the California courts' refusal to follow this Court's 5th Amendment decisions and their refusal to provide a compensatory remedy for a regulatory taking of property. Here, as both courts held below, the California Coastal Commission had no jurisdiction over Mr. and Mrs. Buckley's property, but purported to regulate it anyway so as

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[1] As a matter of California law, the Court of Appeal's decision was vacated when the Supreme Court granted review and transferred the matter for reconsideration.

to deny them the use of their land. (App., pp. 14, fn. 4; 15.) When the Commission insisted on interfering with the construction of a home on the Buckley property – by repeatedly issuing "stop work" orders to the contractors and threatening to impose huge fines and punitive damages on them and the Buckleys – the Buckleys sued, seeking compensation for the *de facto* taking of their property under the 5th Amendment.

The trial court awarded such compensation for the Commission's denial of use of the Buckleys' land. The Court of Appeal affirmed the adjudication that the Commission had acted illegally and without jurisdiction, but nonetheless reversed the compensatory remedy. Compelled to rely on the California Supreme Court's recent decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, *cert. den.*, 142 L.Ed.2d 146 (1998), the Court of Appeal held that the Commission's "mistaken" assertion of jurisdiction could not result in a taking. It also held that, since the Commission improperly asserted jurisdiction over only part of the Buckleys' land, there was no taking because they could have knuckled under to the illegal assertion of regulatory power and built something on the remainder of their land.

Landgate is central to the case at bench. In it, the California Supreme Court simply refused to apply this Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and ruled that – as a matter of law – no taking could occur during the period of time between a government agency's wrongful regulatory action and the time a court held it unconstitutional. That is directly contrary to this Court's clear holding in *First English*. (See pp. 15-17, *infra*.) Because the decision below was arrived at under the compulsion of *Landgate*, the decision in *Landgate* must be analyzed in this Petition in some depth.

The California Supreme Court denied review by a vote of 4-3, with Justices Baxter, Chin, and Brown dissenting. (App., p. 36.)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

Pertinent portions of State law are at App., pp. 73-76.

STATEMENT OF THE CASE

In early 1988, John and Peggy Ann Buckley bought a 2.75 acre lot in an unincorporated part of Los Angeles County known as Malibu. The lot was vacant and zoned for single-family residential development; it was surrounded by similar homes.

Although California's coast is generally subject to the regulatory jurisdiction of the California Coastal Commission, the Legislature has exempted lots in single-family areas from the Commission's jurisdiction. Those are regulated solely by the local government. The only prerequisite was that the local government formally grant exempt status to each individual lot. (Cal. Pub. Res. Code §§ 30610.1, 30610.2; App., pp. 73-76.) Los Angeles County did so for the Buckleys' entire lot on Oct. 24, 1989 (App., p. 64), and so notified the Commission.[2]

Accordingly, as of that date, the Commission lost jurisdiction over any part of the Buckleys' lot. All courts below agreed. (App., pp. 14, 61.) Apparently unwilling to relinquish authority over the Buckleys' property, the Commission falsely asserted that the rear part of the lot was "environmentally sensitive" and thus still under its control. As the trial court would find, the Commission had no evidence to support its

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[2] In August 1989, the Commission had told the Buckleys that they could not develop their lot unless they obtained *either* (1) a Commission permit *or* (2) a certificate of exemption from the County. Within two months, the Buckleys had done the latter.

assertion (App., p. 41), and all courts agreed that, in any event, the law does not permit the Commission jurisdiction over a portion of a lot. In short, the Commission's assertion of jurisdiction was utterly baseless.

Beginning in October 1989, the County duly issued grading and building permits to the Buckleys for their single family home. The County gave final approval in July 1990. In March 1991, more than eight months after the County had approved development, a landslide developed on the rear part of the lot, and the Buckleys prepared to repair it. But the Commission stopped them.[3] The Commission was aware of the need to repair the landslide to prevent serious damage to the property, but it nonetheless refused to permit the Buckleys' requested repairs and thereafter repeatedly blocked their efforts to do anything.

Notwithstanding its complete lack of jurisdiction over the property, the Commission, on March 26, 1991 – nearly a year and a half after the County issued its exemption certificate (App., p. 64) – hand delivered to the Buckleys and their contractor an order to "STOP WORK," that said "[n]o grading is permitted *on this property*," noting that the Commission had not issued a permit and ordering "all unpermitted work" to stop. (App., p. 67; underlining in original; italics added.) The Commission delivered another such stop work order to the property on June 11, 1991. (App., p. 68.) Each stop work order threatened to impose gargantuan fines and penalties on the Buckleys and their contractors; the initial fine would be $10,000, and it could be increased by $5,000 *per day*.

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[3] Although not required – because the Commission had no jurisdiction over their lot – the Buckleys did their best to work with the Commission between May 1990 and March 1991 to obtain Commission approval for their project (in an effort to avoid a costly, enervating battle with a willful and well-funded adversary). The Commission turned them down. The trial court found that it would have been futile for them to continue thereafter to submit additional plans to the Commission. (App., p. 53.) Given the Commission's demonstrated attitude, that finding cannot be gainsaid.

On Nov. 12, 1991, the County's Department of Public Works ordered the Buckleys to repair the landslide. As the Buckleys prepared to do so, the Commission delivered yet another stop work order on Dec. 5, 1991. Again, the order said that "[n]o grading or construction or landfill is permitted *on this property*," noted that the Commission had not issued a permit for any work, and ordered "all unpermitted work" to stop. (App., p. 70; emphasis added.)

The Commission's actions prevented the Buckleys from using, repairing, or selling their property. (App., p. 52.) They had become a shuttlecock between two regulatory agencies warring with each other over their regulatory turf: the County said "go," but the Commission said "stop."

The Buckleys sued the Commission for a taking of their property under the 5th Amendment,[4] and the Commission sued the Buckleys to "enforce" the Coastal Act and to collect the fines and penalties noted above.

The trial court found that the Commission had no jurisdiction over the property, that its actions were improper, that it presented no evidence that any part of the lot was environmentally sensitive or in need of the Commission's protection, and that the Commission's actions had taken the property without compensation in violation of the federal and state constitutions. (App., pp. 60-62.) Specifically, the court found that the Commission's illegal interference prevented the Buckleys from repairing the landslide, resulting in "egregious erosion" of a "continuing" nature that permanently took the property. (App., p. 52.) The trial court awarded the Buckleys $1,355,837 as just compensation and $831,495 for attorneys' fees and costs. (App., pp. 56, 62.)

The Court of Appeal agreed that the Commission had no jurisdiction over the Buckleys' property, but nonetheless reversed the compensatory award. The court reasoned that the

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[4] The federal question was thus raised at the earliest moment, and was argued throughout the trial and appellate briefing. Moreover, the trial court expressly held that the Buckleys' 5th Amendment rights were violated and the Court of Appeal reversed that holding.

Buckleys (a) could have acceded to the Commission's demands and built something on the front part of it (notwithstanding the stop work orders that referred to the entire lot),[5] and (b) were free to develop the entire lot as soon as the trial court ruled against the Commission (notwithstanding the Commission's continuing threats to seek ruinous fines and penalties), and therefore the property was not taken. Moreover, said that court, under *Landgate*, the Commission's "mistaken" assertion of jurisdiction could not, as a matter of law, be a taking, because no taking could begin until *after* the final conclusion of all litigation over the validity of the Commission's actions.

The California Supreme Court denied review by a vote of 4-3. (App., p. 36.) This Petition followed.

REASONS FOR GRANTING THE WRIT

I

FOR THE PAST TWENTY YEARS, CALIFORNIA HAS CONSISTENTLY DENIED 5TH AMENDMENT PROTECTION TO ITS LANDOWNERS AND HAS DEFIED THIS COURT'S HOLDINGS, RESULTING IN WIDESPREAD INJUSTICE AND AN UNDUE BURDEN ON THIS COURT. IT IS TIME TO CALL A HALT TO THIS MAVERICK JURISPRUDENCE

A

The Legal Climate in California Has Become Openly Hostile to the Constitutional Rights of Property Owners

This Court's repeated holdings notwithstanding, California insists on marching to the beat of a different 5th Amendment drummer. This is not just the Buckleys' perception.

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[5] At no time did the court below explain how the asserted "freedom" to knuckle under to an unconstitutional demand of a government agency acting without jurisdiction, somehow cured the deprivation of the Buckleys' constitutional rights effected by the agency's illegal demands that they stop all work on their property. It plainly did no such thing.

California holdings have become the subject of a drumbeat of criticism and, at times, derision by commentators on both sides of the issue. They have aptly characterized California's attitude toward land owners as "more hostile . . . than any other high court in the nation."[6] They concluded that California's attitude was "extreme,"[7] "onerous [and] draconian"[8] – in short, "the most restrictive state in the country with respect to land use."[9] Even commentators outspokenly sympathetic to government regulators concede that California's courts have

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[6] DiMento, *et al.*, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859, 872 (1980). This article was written by eight highly knowledgeable authors, including the late UCLA law professor Donald G. Hagman, widely regarded as the leading land use legal thinker and analyst of his time and noted for his balanced position on the issues.

[7] Fischel, *Regulatory Takings: Law, Economics, and Politics* 226 (Harvard U. Press 1995). The author is a professor at Dartmouth College, and a highly regarded land economist of national stature.

[8] Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, was co-author of one of the most influential books on land use – one that was unequivocally written with a pro-regulation orientation. (See Bosselman, Callies, & Banta, *The Taking Issue* [Council on Environmental Quality 1973].) Professor Callies once summarized the California situation this way (citing examples): "We all know the California courts won't let landowners/developers build anything!" (Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 Urban Lawyer 723, 724 [1981].)

[9] Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides of the issue, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

applied this anti-property owner bias "consistently," and that it "pervades the body of California zoning law generally."[10]

In 1987, this Court responded to California's idiosyncratic interpretation of the 5th Amendment. In reversing two California decisions during a two-week span, this Court noted how out of touch California law had become:

> "Our conclusion on this point is consistent with the approach taken by *every other court that has considered the question*, with the exception of the California state courts. [Citing numerous cases from other state and federal courts.]" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 839 [1987]; emphasis added.)

This Court also plainly told California that it had not been following the 5th Amendment:

> " . . . the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987].)
>
> "While the Supreme Court of California may not have actually disavowed this general rule . . . , we believe that it has truncated the rule by disallowing damages that occurred *prior to the ultimate invalidation of the challenged regulation*." (*First English*, 482 U.S. at 317; emphasis added.)

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[10] 1 Williams, *American Land Planning Law* § 6.03 at 115-116 (1974). Others openly gloated. See Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but expressing the substantive views of five Justices).

One commentator noted that *First English* "brought California, always at the fringe, in line with most other states."[11] Unfortunately, that turned out to be a triumph of pious hope over dismal reality.

Years later, nothing has changed; this Court's admonition notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1997].) A poll of land use experts on both sides of the issue found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts."[12] This merely confirmed what others had known already: California had become the butt of black humor in the national land use community. People elsewhere, it was said, "have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat."[13] In a more serious vein, these two knowledgeable commentators[14] went on to observe that, "[i]n California, the courts have elevated governmental arrogance to a fine art." (*Id.* at 263.) And so they have, the case at bench being the quintessential "Exhibit A."

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[11] Merriam, *A Planner's View of* Dolan, in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 10 at 211 (ABA 1996). The author is a noted pro-regulation advocate and a past president of the American Institute of Certified Planners.

[12] Coyle, *Property Rights and the Constitution* 11 (State U. of N.Y. Press 1993).

[13] Babcock & Siemon, *The Zoning Game Revisited* 293 (Lincoln Inst. of Land Policy 1985).

[14] The late Richard Babcock was, at the time, the recognized dean of the Nation's land use bar and – significantly – a vigorous defender of expansive government regulatory control.

B

California's Maverick Land Use Decisions Have Consumed an Inordinate Part of This Court's Scarce Resources – More Than All Other Jurisdictions Combined. It's Time to Align California's Takings Jurisprudence With the Rest of the Nation

The upshot of "elevat[ing] governmental arrogance to a fine art" is that California regulators do as they please.[15] After all, with a compliant judiciary that is willing to shield them from accountability to the Constitution, even if it means defying this Court's pronouncements, they believe that they have little to fear. The foreseeable result is more draconian regulation[16] that inspires more litigation. Abused property owners who are backed into a corner feel they have nothing to lose and file suit in the face of odds heavily against them.

And that brings cases here. Lots of them. A review of this Court's docket since 1978, when the modern era of this Court's regulatory taking jurisprudence began, reveals this startling fact: *land use cases arising in California account for more of this Court's decisions in this field than those from all other jurisdictions combined.* Many of the household names in 5th Amendment law arose in California: *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v.*

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[15] As Professor Coyle observed: " . . . the basic message of the [California Supreme] court was 'Do what you want.' " (Coyle, *supra*, p. 156.)

[16] It has been noted by another leading scholar, Professor Bernard Frieden, then Chairman of the Planning Department at M.I.T., that California land use laws have been freely abused so that, while paying lip service to "good planning," they were in fact applied to advance the narrow, parochial self-interest of vocal suburbanites. (Frieden, *The Environmental Protection Hustle* [M.I.T. Press 1979].)

County of Los Angeles, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 827 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Ehrlich v. Culver City*, 512 U.S. 1231 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235 (argued Oct. 7, 1998; decision pending).[17]

When the eleven cases decided by this Court from California are compared to only ten land use regulatory taking cases arising in *all other jurisdictions combined*,[18] it is apparent that something is alarmingly amiss in California. One state – no matter how large and populous – should not account for more cases in this Court than the other sixty-two jurisdictions combined.[19] And this Court alone knows how many unsuccessful petitions have been filed seeking review of additional California decisions.

The reason for this lopsided caseload is apparent: as Babcock and Siemon put it, the California judiciary's abject deference to local land use regulators has encouraged "governmental arrogance" (Babcock & Siemon, *supra* at p. 263), and has led to a regulatory climate in which abuse of landowners' rights is unexceptional. This Court now has the opportunity to respond by relieving California's property owners of their status as constitutional "poor relations" (see

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[17] Although *Del Monte Dunes* came from the federal court system, it was in court because of the mistreatment a California city meted out to the property owner – mistreatment emboldened by the California judiciary's historic deference to regulators.

[18] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).

[19] This figure is the sum of the other 49 states plus the 13 federal circuits.

Dolan, 512 U.S. at 392) and, in the process, unburden its own docket from this unseemly avalanche of California land use cases. It is time to tell California that it is, after all, a part of the Union.

C

In the Past Year, California Has Repeatedly Thumbed Its Judicial Nose at This Court's Decisions, Ignored This Court's Considered Holdings, and Restored California Takings Law to its Anti-Property Owner Bias of the Early 1980s

There is no way to say this except plainly: in a series of cases culminating during the last year, California has defiantly restored its law to what it was in 1986 – i.e., *before* this Court corrected California's deviance through *Nollan* and *First English*. It has *de facto* nullified this Court's holdings, and has undermined whatever progress this Court made in the last two decades in bringing clarity to the law of regulatory takings.[20]

The criticism and recognition of this new California reality has now gone beyond academics and practitioners. The California Supreme Court is irreconcilably split: three of its seven members have, in forceful language, exposed the California position for what it is.

Charging California with refusing to follow this Court's constitutional decisions on regulatory takings, Justice Janice

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[20] It has also undermined this Court's procedural decision in *Williamson County* that regulatory taking cases be fought primarily in state courts "*if* a state provides an adequate procedure for seeking just compensation. . . . " (*Williamson County*, 473 U.S. at 195.) As now seems obvious, California no longer provides even a theoretically "adequate procedure for seeking just compensation" – having declared itself unaffected by this Court's fundamental holdings – leaving California property owners no alternative but to seek relief in federal courts. (See, e.g., *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 [9th Cir. 1990]; *Hoehne v. County of San Benito*, 870 F.2d 529, 533-534 [9th Cir. 1989].)

Rogers Brown put it bluntly, but accurately: "in California, at least for now, *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] is a dead letter." (*Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, 1043 [1998] [Brown, J., dissenting].) This was based on the California majority's "conviction that more than a decade of reinvigorated [United States Supreme Court] takings jurisprudence has changed nothing" (*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 1024 [1999] [Brown, J., dissenting]), a conviction born of the "evident" fact that the California "majority is unwilling to come to terms with the true meaning and operative effect of *Lucas* and *First Lutheran*." (*Landgate*, 17 Cal.4th at 1041.)

Justice Marvin Baxter, in a lengthy and scholarly discussion of this Court's takings jurisprudence, demonstrated that the California majority simply refuses to follow this Court's decisions. (*Santa Monica Beach*, 19 Cal.4th at 983-1018 [Baxter, J., dissenting].) Unmasking the majority's effort to disguise its handiwork[21] as seemingly in compliance with this Court's teachings, Justice Baxter concluded simply that "[t]he assumption of the majority that just compensation need not be paid . . . finds no support in the authorities on which they rely." (*Id.* at 1003.) "Two centuries of jurisprudence since *Marbury v. Madison* . . . have escaped notice." (*Id.* at 1014.)

With respect to this Court's seminal decision in *First English*, (a) establishing that the constitutional remedy for a regulatory taking is compensation and (b) holding that temporary takings are entitled to the same constitutional protection as permanent takings, Justice Ming Chin demonstrated that the current California position not only ignores this Court's holding, but actually embraces the *dissent* in *First English*. (*Landgate*, 17 Cal.4th at 1034 [Chin, J., dissenting]; see also 17 Cal.4th at 1039 [Brown, J., dissenting].)

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[21] Such subterfuge is an old California tactic in this field. As this Court noted in *First English*, "the California Supreme Court may not have *actually disavowed*" the constitutional mandate, but its holdings "truncated the rule." (*First English*, 482 U.S. at 317; emphasis added.) Here, the words may be different, but the tune is the same.

It is hard to improve on Justice Brown's observation that:

> "when [the United States Supreme Court] has made an attempt to resolve definitively a difficult point of constitutional law that is applicable to the very issue before us, we ought either to respect its judgment or provide a reasoned basis for refusing to do so. To do otherwise, in Charles Fried's words is 'judicial impudence.' [Citation.]" (*Landgate*, 17 Cal.4th at 1035 [Brown, J., dissenting].)

California law has thus been plunged into such "a state of confusion" (*Santa Monica Beach*, 19 Cal.4th at 983 [Baxter, J., dissenting]), that Justices on both sides of the California divide have urged this Court to resolve matters, "preferably sooner rather than later" (*Santa Monica Beach*, 19 Cal.4th at 1035 [Brown, J., dissenting]). While it is not surprising that a dissenter would do so, a member of the majority has also acknowledged the presence of questions that "only" this Court can resolve and, "given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises." (*Santa Monica Beach*, 19 Cal.4th at 982-983 [Kennard, J., concurring].)

As shown more fully *post*, California is now openly defying this Court's interpretation of paramount constitutional authority. It has embraced a "rule" that was flatly rejected by this Court in 1987, and espoused then only by Justice Stevens' dissent. The fact that three of California's seven Supreme Court Justices are refusing to join that intellectual rebellion, and are protesting in such strong language, highlights it for all to see. Those same three Justices dissented when the California Supreme Court denied discretionary review in this case. (App., p. 36.)

The line has been plainly drawn in the California sand. It should be apparent that only an unequivocal response from this Court can restore constitutional primacy west of the Colorado River. As things stand now, California courts have performed the intellectual equivalent of firing on Fort Sumter, and thus far – alas – they have gotten away with it. It is high time to put this unfortunate judicial *ante bellum* attitude to an

end. Judges "in every state" (U.S. Const., Art. VI, cl. 2) are bound by the Constitution (see *Cooper v. Aaron*, 358 U.S. 1, 18 [1958]), and that includes California. What is at stake here is the integrity of the rule of law.

II

AS EXEMPLIFIED BY THE OPINION BELOW, CALIFORNIA'S COURTS GIVE ONLY LIP SERVICE TO THIS COURT'S CONTROLLING DECISIONS IN CASES SUCH AS *FIRST ENGLISH* AND *LUCAS*. THE PROTECTION PROVIDED BY THE 5TH AMENDMENT IS IN FACT NOT AVAILABLE TO CALIFORNIA'S LANDOWNERS

To see California's open rebellion, one need go no further than to compare this Court's analysis in *First English* with the 1998 decision in *Landgate*. In *First English*, this Court reviewed – and rejected – California's rule that the remedy for a regulatory taking was to invalidate the regulation. This Court held that compensation was constitutionally mandated. (*First English*, 482 U.S. at 315, 322.) When it overruled California's unconstitutional rule, this Court did so *precisely* because California refused to permit compensation for the period *before* judicial invalidation that a regulation kept private property from being put to economically productive use. The California rule that this Court consigned to the constitutional scrap heap in 1987 is *precisely* what the California Supreme Court resuscitated in *Landgate* and the Court of Appeal applied in the case at bench. The deliberate nature of California's intellectual insurrection is apparent when one reads *First English*. This Court could not have been clearer in its opening paragraph, which left no doubt as to the issue before it, the correct rule, and California's disregard of it:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a 'taking' of his property*. We disagree, and conclude that in

> these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would *require compensation for that period*." (*First English*, 482 U.S. at 306-307; emphasis added.)
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> "While the Supreme Court of California may not have actually disavowed this general rule . . . , we believe that it has truncated the rule *by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation*." (*First English*, 482 U.S. at 317; emphasis added.)[22]

First English thus holds that, once the regulatory action is administratively final, compensation is constitutionally compelled for the period *during litigation that determines the invalidity of the regulation* when its impact is to prevent all economically productive use of the regulated land.[23] California, however, has simply nullified this Court's teaching. It has defiantly re-established pre-*First English* law by holding that the aggrieved landowner must first sue to invalidate the regulation, and that such a litigational period is merely part of the "normal delay" in the "planning process" and cannot – regardless of the illegality of the regulation and its effect on the property owner – result in a constitutional taking that requires compensation. (*Landgate*, 17 Cal.4th at 1010.) Once again, California has "truncated the [constitutional] rule" (*First English*, 482 U.S. at 317) by refusing compensation for

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[22] See *Id.* at 319 [5th Amendment "requires" payment for losses "during this period"]; *id.* at 322 [payment for the use of the property "during this period" is constitutionally mandated].

[23] In *Williamson County*, this Court was explicit that, once administrative finality is achieved, the case is ripe, then and there (473 U.S. at 186-187), and it is *not* necessary for the aggrieved landowner to seek non-monetary judicial review remedies before suing to seek just compensation. (See also *Preseault v. I.C.C.*, 494 U.S. 1 [1990] [challenge to constitutionality of statute is not ripe until after landowner seeks just compensation].) California, however, has obverted that rule as well, holding that aggrieved owners must exhaust *all* administrative *and* judicial remedies before being able to seek just compensation. (See *Hensler v. City of Glendale*, 8 Cal.4th 1, 10 [1994].)

this period. And this time it did so knowingly, in spite of three dissenters forecefully demonstrating the conflict with *First English*.

Not only does the California position conflict with *First English*, it conflicts with other state court decisions. See, e.g., *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. App. 1994). In each of these cases, the courts held that a taking claim is ripe when administrative proceedings have concluded and a final administrative decision has been made. As the Connecticut Supreme Court put it, "It is unnecessary for the plaintiff to await *judicial review* of the administrative action" because, as this Court held in *First English*, invalidation of the regulatory action would not suffice to provide the constitutionally-mandated compensation. (*Cumberland Farms*, 247 Conn. at 213; emphasis in original.)

This Court's decision in *Lucas* fared no better at the hands of the California court. In *Lucas*, this Court held that denial of all economically beneficial or productive use of property, whether permanent or temporary, is a "categorical" *per se* taking that requires compensation. (*Lucas*, 505 U.S. at 1015.) Under California's newly resurrected pre-1987 rule, however, even such a drastic impact *cannot* be deemed a taking if the "development restrictions on the subject property substantially advanced some legitimate state purposes[24] so as to justify the denial of the development permit." (*Landgate*, 17 Cal.4th at 1022.)[25]

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[24] Of course, how there can be a "legitimate" governmental purpose when, as here, an agency acts unconstitutionally and without jurisdiction (i.e., beyond the purview of its legitimate powers) no one has bothered to explain.

[25] *Landgate* is the key here because the court below simply applied *Landgate*'s rationale. As the court below noted, somewhat self-consciously:

California's current test applied in the case at bench is thus contrary to *Lucas*. Indeed, it is contrary to *Agins*, where this Court first announced disjunctively that a taking occurs if a regulation *either* denies the property owner economically viable use *or* fails to substantially advance a legitimate state interest. (447 U.S. at 260.) Both here and in *Landgate*, the California courts *de facto* overruled *Agins* and twisted this Court's disjunctive test into a conjunctive one. It is now not enough to prove that the government denied all economically productive use for a period of years (at bench, the period is now 10 years); landowners would also have to prove that there was no legitimate state interest served. That distortion of *Agins* and defiance of the *Lucas* test rightly drew the California dissenters' ire. They concluded that the California position is "flatly incompatible with *Lucas*." (*Landgate*, 17 Cal.4th at 1042; Brown, J., dissenting.) They are right. And they are not alone. The most recent book published about regulatory takings agrees that *Landgate* is contrary to *Lucas*:

> "[T]he [*Landgate*] majority said such reasonable errors are a normal part of the regulatory process. By contrast, agency error *would* be a taking under *Lucas* if it indefinitely eliminated all use of the property, just as an authorized agency action would be." (Meltz, Merriam, & Frank, *The Takings Issue* 79 [Island Press 1999]; emphasis added.)[26]

> "*For better or for worse*, in a four-to-three decision, the [California Supreme Court] majority held that a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. [Citation.]" (*Buckley*, 68 Cal.App.4th at 200; App., p. 30; emphasis added.)

[26] This analysis contrasting *Landgate* with *Lucas* seems particularly significant here because one of its authors – Richard M. Frank – is a Senior Assistant Attorney General for California, and was one of the lawyers who convinced the California Supreme Court to rule as it did in *Landgate*. (See 17 Cal.4th at 1009.)

The benefit of this Court's most fundamental takings decisions – decisions that took many years and monumental effort on this Court's part to create[27] – is being withheld from California's landowners. They are no less entitled to constitutional protection by this Court than landowners in other states – and far more in need of it.

III

CURRENT CALIFORNIA LAW CONFLICTS WITH THIS COURT'S DECISIONS BY HOLDING THAT NO TAKING CAN OCCUR – REGARDLESS OF THE ECONOMIC IMPACT OF THE REGULATORY ACTION – IF THE STATE HAD AN ARGUABLY LEGITIMATE BASIS FOR ITS ACTIONS

The decision below, building on the California Supreme Court's decision in *Landgate*, holds that there cannot be a regulatory taking as long as the government had an arguably legitimate basis for its actions. (App., p. 32; *Landgate*, 17 Cal.4th at 1022.)

Wrong.

This Court's jurisprudence has consistently held that takings are measured by the impact of the regulators' acts on the property owner, not their intentions. The government can no more confiscate private property for good reasons than for bad ones. Indeed, in *every* direct condemnation case, there is a finding of public use and public necessity. But the presence of those factors does not vitiate the Just Compensation Clause – on the contrary, it triggers its applicability. Justice Brennan's frequently cited opinion in *San Diego Gas* aptly encapsulated this Court's teachings with this quote from Justice Stewart:

> "[T]he Constitution measures a taking not by what a State says, or by what it intends, but by what it *does*." (*San Diego Gas*, 450 U.S. at 653 [Brennan,

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[27] Some of the tortured history is recounted in *First English*, 482 U.S. at 310.

> J., dissenting but expressing the substantive views of a majority]; quoting with approval from *Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring]; emphasis in original.)

The Court of Appeals for the Federal Circuit expanded on that thought:

> "The purpose and function of the [5th] Amendment being to secure citizens against governmental expropriations, and to guarantee just compensation for the property taken, what counts is not what the government said it was doing, or what it later says its intent was. . . . What counts is what the government *did*. [Citing *Hughes*.]" (*Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 [Fed. Cir. 1983]; emphasis in original.)

This Court has applied that bedrock constitutional philosophy repeatedly. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the New York Court of Appeals upheld a statute as a valid exercise of the police power. But commendable goals, like good intentions, are no substitute for adherence to the Just Compensation Clause:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (*Loretto*, 458 U.S. at 425; emphasis added.)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use. This Court disagreed and, in the process, explained the relationship between justifiable regulatory actions and the takings clause of the 5th Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress could assure the public a free right of access

> to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*" (*Kaiser*, 444 U.S. at 174; emphasis added; citations deleted.)[28]

And, of course, that concept is the underpinning for this Court's categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking. (*Lucas*, 505 U.S. at 1015; see *Agins*, 447 U.S. at 260.) That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.) In other words, for a taking to occur, it matters not whether the regulators acted in good or bad faith. What matters is the impact of their acts, not their motives. Indeed, it has long been settled that courts will not inquire into the motivation of political decisions to take private property, thus making their *bona fides* judicially off limits. (See, e.g., *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 [1923]; *Mugler v. Kansas*, 123 U.S. 623, 661 [1887].)

And yet, the rule applied in California (both below and in *Landgate*), is that when the regulators snuff out all reasonable private land use, requiring years of litigation to correct, the

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[28] In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate goals, had taken private property in violation of the 5th Amendment. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though legitimate*, nonetheless required compensation. This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking resulting from validly constructed government works is just compensation, not judicial second guessing of valid government policies and decisions.

property owner cannot even contend that a 5th Amendment violation occurred if the government can conjure up some objectively rational basis for its actions. (App., p. 32; *Landgate*, 17 Cal.4th at 1022.) That telescopes takings analysis into due process analysis, something this Court has expressly refused to do. (*E.g., Nollan*, 483 U.S. at 834, fn. 3; *Eastern Enterprises v. Apfel*, 524 U.S. ___, 141 L.Ed.2d 451 [1998] [compare plurality, concurring, and dissenting opinions].)

California's focus on the regulators' objective good faith is thus wholly contrary to this Court's consistent teachings, and presents aggrieved landowners in that State with a Catch-22 conundrum – i.e., absent bad faith on the part of the government (say the California courts), there is no taking (*Landgate*, 17 Cal.4th at 1022); but when landowners seek to *offer evidence of* bad faith, they are told that they may not do so (*Landgate*, 17 Cal.4th at 1022).

IV

IT CANNOT BE CONSTITUTIONAL TO REQUIRE LANDOWNERS TO MAKE A HOBSON'S CHOICE OF SUCCUMBING TO THE WRONGLY ASSERTED REGULATORY POWER OF A GOVERNMENT AGENCY THAT HAS NO JURISDICTION OVER THEIR PROPERTY, OR LOSE THEIR ABILITY TO VINDICATE THEIR RIGHTS UNDER THE JUST COMPENSATION CLAUSE OF THE 5TH AMENDMENT

It is undisputed that the California Legislature exempted coastal properties like the one at bench from the Coastal Commission's regulatory grasp. Single family lots in areas already built up in that fashion are to be regulated by the local land use authorities, not the Commission. (Cal. Pub. Res. Code §§ 30610.1, 30610.2; App., pp. 73-76.) The regulatory jurisdiction shifted formally when the Buckleys obtained a

certificate of exemption from Los Angeles County on Oct. 24, 1989. (App., p. 64.)[29]

Notwithstanding the Buckleys' exemption, the Coastal Commission continued to interfere with their efforts to build even a single family home on their lot. Indeed, the Commission prevented the Buckleys from repairing a landslide on their lot, a pointless and arbitrary action that caused severe damage to the property to no rational purpose. On March 26, 1991, the Commission delivered a "stop work" order to the Buckleys and their contractor. In all capital letters, on the Commission's letterhead, it said at the top of the page, "STOP WORK" four times. The order identified the property by street address and said:

> "You are hereby notified to stop all unpermitted work.[30] No grading is permitted *on this property*. A Coastal Permit has not been issued for this project." (App., p. 67; emphasis added.)

The notice also threatened to impose fines for any work on the property, including a base fine of $10,000 plus additional fines of as much as $5,000 *per day*. Similar notices were delivered by the Commission on June 11, 1991 and Dec. 5, 1991. (App., pp. 68-72.) Confronted with the unmistakable presence of the County's certificate of exemption, the Commission ingenuously asserted that a *part* of the Buckleys' single lot was environmentally sensitive so the Commission had jurisdiction over that part. That ploy flew in the teeth of the statute, which exempted entire lots, and the County's

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[29] Apparently, the Commission has never liked this legislative restriction on its jurisdiction. In 1983, the Commission filed – and lost – a challenge to exemptions issued by the City of Los Angeles. (*California Coastal Commn. v. City of Los Angeles*, L.A. Superior Ct. case no. 430788 [1983].) Thus even though, as noted earlier, the Commission's state of mind is irrelevant, it is much more likely that its action was consciously (and stubbornly) undertaken, rather than being "mistaken," as gently characterized by the Court of Appeal. (App., p. 31.)

[30] The Buckleys *had* all the appropriate *County* development permits. This reference is to a *State* permit *that the Commission had no jurisdiction to issue, deny, or even consider.*

certificate, which also exempted the Buckleys' entire lot. (App., pp. 65-66.) Moreover, as the trial court found, the Commission never presented evidence to support its claim of environmental sensitivity (App., p. 41), thus rendering its position unsupportable and plainly in bad faith. Nonetheless, even after the trial court held that the Commission had no jurisdiction over the Buckleys' lot, the Commission remained defiant. In the trial court's words: "The Commission has represented to the Court, through its counsel, that it will continue to claim jurisdiction until all appeals are exhausted." (App., p. 50.)

But though without *jurisdiction*, the Commission was not without *power*. Its "stop work" orders were directed to the Buckleys' contractors as well as to them. As each was posted, the contractors immediately complied. After all, contractors do business pursuant to State licenses, and no single family home construction project can be worth risking either their licenses or the kind of ruinous fines the Commission threatened to impose. That same cloud of fiscal disaster hung over the Buckleys themselves.[31] Regardless of their firm belief in the correctness of the trial court's ruling, they had no guarantee that the Commission would not somehow convince a California appellate court to reverse it.[32] Recall that, in *Nollan*, the Commission persuaded the California courts that reconstruction of a beachfront cottege would create a "psychological barrier" which would justify what this Court

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[31] This is no hyperbole. See, e.g., *Whaler's Village Club v. California Coastal Commn.*, 173 Cal.App.3d 240 (1985), where the California courts held the Commission to be within its powers when it sought to confiscate beachfront homeowners' land *and to fine them* because they created emergency revetments (without Commission approval) in order to save their homes from being destroyed by unusually severe winter tides.

[32] In light of the history of California's attitude toward property owners described earlier, that concern was not unfounded. Beyond that, the Commission has for years had a record of reversing unfavorable trial court rulings that is magnitudes better than that of mere mortal litigants. (See the statistics reported in Berger, *You Can't Win Them All – Or Can You?* 54 Cal. State Bar J. 16 [Jan./Feb. 1979].)

termed "out and out . . . extortion" of their land. (*Nollan*, 483 U.S. at 837-838.)

And yet, the Court of Appeal held that there was no taking because the Buckleys could have developed the front portion of the lot and could have developed all of it once the trial court had ruled (App., p. 20).

What a Hobson's choice to put before these innocent citizens! Either concede regulatory power to an agency that had no jurisdiction and lose the use of at least half of your property, or lose the ability to seek constitutionally mandated compensation for the impact of the agency's actions. Actually, under this court-imposed scenario, the Buckleys would lose their constitutional rights either way for, in California, when landowners comply with an unconstitutional government demand under protest and then seek the adjudication of its illegality, they are told by the state courts that their compliance with the illegal demand is deemed to waive their rights. (*E.g., Pfeiffer v. City of La Mesa*, 69 Cal. App.3d 74 [1977].)

This California rule plainly defies the unconstitutional conditions doctrine; government cannot condition the exercise of constitutional rights. (*Perry v. Sindermann*, 408 U.S. 593 [1972].) In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), landowners asked the City of Klamath to vacate certain "paper streets" (i.e., streets that appeared as lines on an official map but that had never been built) across their land. The city agreed but, in exchange, demanded title to the owners' geothermal wells. There was no connection between the wells and the street vacation, and no question that the wells were substantially more valuable then the streets sought to be vacated. The landowners were simply convenient "fish in a barrel" from whom the city thought it could extort something to which it was not entitled. As the Court of Appeals saw it, the city's action was a demand that the landowners give up their 5th Amendment right to compensation for their property as a condition to obtaining street vacation. Holding the city's position constitutionally infirm, the court said:

> "the government may not impose a choice between the government benefit and the exercise of a constitutionally guaranteed right." (*Parks*, 716 F.2d at 650.)

In so holding, the court relied on *Perry*, where this Court held that a public employer may not condition employment on the employee's forsaking First Amendment rights. This Court likewise applied the *Perry* rule in *Dolan*, 512 U.S. at 385-386, to the property owner's claim that the city was forcing her to choose between obtaining a building permit and being compensated for property taken for municipal greenbelt/bikeway/flood channel purposes.

Here, the Court of Appeal conditioned the Buckleys' ability to seek compensation for a 5th Amendment violation on their agreeing to submit to the exercise of *power* – not lawful jurisdiction, but merely naked, *unlawful* power – by the Commission in a way that the same court had already held to be "void." (App., pp. 15, 20.)

In this context, it bears emphasis that the government is not merely another citizen. The Buckleys were faced with an opponent that demonstrated both the will and the ability to remain "in their face" for as long as it took to achieve its goal. The Commission repeatedly posted "stop work" orders that it had no authority to issue, and sent those orders to the Buckleys' State-licensed building contractors, threatening their livelihood via ruinous fines for continued work. Its lawyer (a Deputy Attorney General) wrote to them, repeating the financial threats. Even after losing at trial, it told the trial court that it would continue its claim of regulatory jurisdiction until it had run out of appeals, which is just what it did. And yet, in the teeth of that, the Court of Appeal faulted the Buckleys because they did not defy the Commission's stop work orders and build with this sword of Damocles hanging over them.

With respect, the Court of Appeal ignored reality. Or, perhaps, it merely illustrated the grim reality that property owners have to face in California courts. A more constitutionally sensitive view of similar facts was expressed by the Court of Appeals for the Federal Circuit. In *Yuba Goldfields,*

Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983), the United States asserted ownership of property containing precious metals. The U.S. Army Corps of Engineers wrote to the record owner of the mineral interest and ordered that further dredging or removal of material "is prohibited." As here and in *Landgate*, the government said it asserted its claim "only long enough to obtain a judicial determination." (*Id.* at 886.)

But, unlike the California courts, the Federal Circuit recognized the impact of such governmental conduct:

> "The trial court's characterization of the role of the United States as that of a private person is flawed by its disregard of the express notice, 'dredging is prohibited.' Private persons do not talk like that; governments do.
>
> * * *
>
> "[T]he United States is not a private party. It imposes penalties, criminal and civil, the threat of which lurks behind government statements like those here involved, regardless of what the government may have intended. The United States calls upon unlimited resources." (*Id.* at 889.)

The situation at bench is far more severe than in *Yuba Goldfields*. The threat of penalties did not "lurk" behind the scenes. It was right out front. Even though it lacked jurisdiction, in every "stop work" order and letter, the Commission threatened the Buckleys and their contractors with debilitating fines. (App., pp. 67-72.) As this Court put it in the classic opinion in *Ex Parte Young*, 209 U.S. 123, 146 (1908):

> "When the legislature, in an effort to prevent any inquiry of the validity of the particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

The reality facing Mr. and Mrs. Buckley was that their implacable foe was hovering over them, constantly threatening to bankrupt them and anyone who dared to work for them. They had no "choice" to build anything; their only "choice" was to surrender their constitutional rights to build on their land (see *Nollan*, 483 U.S. at 834, fn. 2), or to surrender their right to be compensated for the taking of their land (see *First English*, 482 U.S. at 322). To say that the court below was unrealistic when it so asserted in its Opinion (App., p. 20) would be to indulge in gross understatement. What the record shows is the Commission's wrongful exercise of raw governmental power that realistically prevented all use of the property. It was a constitutional outrage for California's appellate courts to apply their own insular brand of "law" to tell the Buckleys that their constitutional "rights" consisted of either knuckling under to the Commission's lawless demand or forfeiting their right to the protection of the 5th Amendment. This Court would not tolerate such parochial defiance of the supreme law of the land when other constitutional rights were threatened (e.g., *Cooper v. Aaron*, 358 U.S. 1), and no reason appears why defiance of the Just Compensation Clause should be tolerated here (compare *Dolan*, 512 U.S. at 392).

CONCLUSION

With the surfeit of land use litigation produced in California's courts and more than two decades of experience since this Court announced in *Agins* that government action denying economically viable use of land requires compensation, one thing is incontestible: *there is no reported California case in which a property owner has ever recovered compensation for a regulatory taking from a California state court* – in spite of the fact that California is the most populous, the most litigious, and probably the most highly regulated state in the Union, that has spawned more regulatory takings cases in this Court than all other American jurisdictions combined. The reason for that is now abundantly clear: that's the way the California Supreme Court wants it and, to that end, it has no

inhibition about frustrating and indeed defying this Court's 5th Amendment decisions.

That situation must change. Californians are entitled to better. The integrity of this Court's holdings is entitled to better. The Constitution is entitled to better. Mrs. Buckley prays that certiorari be granted, that California's rules be brought in line with this Court's settled jurisprudence, and that the compensatory judgment entered by the trial court be reinstated.

Respectfully submitted,

MICHAEL M. BERGER*
BERGER & NORTON
Counsel for Petitioner
**Counsel of Record*

APPENDIX A

[No. B081544. Second Dist., Div. Two. Dec. 1, 1998.]

PEGGY ANN BUCKLEY et al., Plaintiffs and Respondents, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant.

PEGGY ANN BUCKLEY et al., Cross-complainants and Respondents, v. CALIFORNIA COASTAL COMMISSION, Plaintiff, Cross-defendant and Appellant.

Alan V. Hager, Joseph Barbieri, Matthew Rodriguez and Terry T. Fujimoto, Deputy Attorneys General, for Defendant and Appellant and for Cross-defendant and Appellant.

Thomas M. Banks, Shapiro, Rosenfeld & Close, Eliot G. Disner and Elizabeth E. Webb for Plaintiffs and Respondents and for Cross-complainants and Respondents.

OPINION

NOTT, J. –

I.

The California Coastal Commission (Commission) appeals from a judgment awarding $2,187,331.76 in damages, attorney fees and costs to respondents Peggy Ann

and John Buckley for the taking of their property without compensation.[1]

We affirm the trial court's ruling that the Commission had no jurisdiction over the rear portion of the Buckleys' lot. However, the damage award is reversed because the evidence does not establish that the mistaken assertion of jurisdiction by the Commission amounts to a taking. (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006 [73 Cal.Rptr.2d 841, 953 P.2d 1188].) For the reasons stated below, we also reverse the award of attorney fees.

II. Facts and Procedural History

In January 1988, the Buckleys purchased an undeveloped lot in Malibu, which was at the time an unincorporated area of the County of Los Angeles (County). The Buckleys intended to build a single-family residence on the lot, which is located in an established single-family residential community. They were informed by their real estate broker that the lot was exempt from review or regulation by the Commission for construction of a single-family residence. The Buckleys paid $485,000 for the property, and they invested between $200,000 and $300,000 adding electricity, water, gas, a fence, a septic

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[1] According to a declaration filed in November 1996 by counsel for John Buckley, the Buckleys are married but have been separated and estranged for many months. Peggy Ann Buckley had her own attorney for the damages phase of the trial, and continues to be represented by separate counsel on appeal. We will refer to the Buckleys separately when their arguments on appeal require it.

system, and a foundation for the garage to the property; and having the building and grading plans developed.

The lot is 2.75 acres, rectangular in shape, running lengthwise from east to west. The front portion of the lot is a level area of about 1.15 acres that descends into a steep ravine in the westerly or rear portion, covering about 1.6 acres. Before it was purchased by the Buckleys, significant road grading had occurred on the west portion of the lot, including a road cut along the slope of the ravine's north side wall.

In November 1988, the Buckleys retained a soils engineering firm. The geological engineer, Dale Glenn, testified that she first visited the site in 1988 with the soils engineer, who "indicated that there were some stability problems with the canyon and that in order to accomplish development of the site, that it would be very likely that the canyon would have to be filled in and that we needed a study in that canyon." However, Glenn described the original grading plan, trial exhibit 30, as a plan for grading the front portion of the lot. In her direct testimony, she was asked whether, as of February 27, 1990, "would it have been possible for the Buckleys to develop their property by simply grading the portion of the property shown in exhibit 30 and constructing the residence that was permitted in 1989?" Glenn replied, "Yes."

Meanwhile, although they did not yet have grading plan approval, by August 15, 1989, the Buckleys had stockpiled fill dirt on the front portion of the lot. On that date, the Buckleys received a letter from the Commission stating that the property was located in the coastal zone, and that a coastal development permit was required for

any development. On August 25, in response to the Buckleys' answer to its earlier letter, the Commission agreed that the County had the authority to exempt from coastal development permits development projects involving new single-family homes.[2]

A subsequent letter from the Commission stated that because the rear portion of the lot was in an environmentally sensitive habitat area (ESHA), the rear portion was not part of the exemption. The Buckleys were informed that they could either seek a coastal development permit or submit to the Commission a valid exemption issued by the County. They were warned that if they chose the latter, they would not be allowed to develop the rear of the property where the ravine is located.

The Buckleys replied that they were not developing the rear portion of the lot and that if they decided to do so in the future, they would seek a coastal development permit.

The County issued the exemption on October 24, 1989. The Buckleys' plans for grading the front portion of the lot and building a residence of 15,000 square feet were approved by the County.

In the fall of 1989, the Buckleys decided to sell the lot rather than build on it. They were advised by real estate

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[2] The exemption is known as a "Calvo exclusion" after the former state assemblyman who sponsored the legislation permitting the exemption, which is codified at Public Resources Code sections 30610.1 and 30610.2.

All further statutory references are to the Public Resources Code unless otherwise stated.

brokers in the area that a dispute with the Commission would have a negative impact on the selling price. John Buckley testified that he was told that with a permit to build, the property was worth between $1.5 and $2 million.

The Buckleys' expert, Frederick Chin, a real estate consultant and appraiser, testified that the land value appreciated approximately 115 percent a year between January 1988 and May 1990; and that the lot was worth $1.3 million in May 1990.

A new grading plan, dated February 1990 and referred to as exhibit 31 at trial, was readied for submission to the County. It called for three building pads in the rear section of the lot: two pads in the ravine and one on the ridge. The pads were to be for a garden, a riding ring or tennis court, and a guest house. The plan was submitted to the County in April 1990, but not submitted to the Commission until October 1990.

Dale Glenn testified that the new grading plan would have stabilized the ravine. However, she admitted on cross-examination that the plan was designed to increase usable space. She said, "The canyon was unstable, it needed to be stabilized, that was going to create a great expense for the Buckleys and to offset some of that expense, we recommended that they do a grading solution that would gain saleable or some usable land on the property as opposed to some other method which we hadn't explored even at that time . . . for instance, soldier

piles would put a great expense on the site and produce nothing."[3]

In February 1991, the Commission's staff report recommended denial of the request because the development would be inconsistent with the ESHA policies of the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq. (Coastal Act)). Glenn testified that a few days after the rain in March 1991, just before the Commission's March 13 hearing on the permit application, she discovered a landslide condition on the lot. The Buckleys informed the commissioners that a landslide had developed in the ravine and that it threatened the adjacent properties. The Commission denied the application. The Buckleys did not appeal the Commission ruling.

Just after the Commission's denial, the County determined that the Commission had no jurisdiction over any portion of the lot. As testified to by Dale Glenn, the County approved the later grading plan, exhibit 31, on March 19, 1991. The Buckleys began grading the lot. The Commission sent a stop work order in March 1991 which stated: "RE: Grading in a canyon, outside the exclusion area with valid coastal development permit." The order notified the recipient "to stop all work. Any additional

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[3] Donald Kowalewsky, an engineering geologist called to testify for the Commission, explained that soldier piles are reinforced concrete caissons, two feet in diameter, with a steel reinforcement beam down the center. In this case, the piles could be placed in the ground near the top of the slope and extend to a depth of about 40 feet, which would prevent future deterioration of the slope from undermining the driveway or the rest of the improved properties to the south of the area of the landslide.

unpermitted work on this site will be considered . . . a violation of the Coastal Act." Shortly after that, Malibu became an incorporated city, and a grading and construction moratorium was imposed on all city properties.

At some point, the Buckleys decided to grade the rear portion of the lot based on the County approval they received. In June 1991, the Commission again hand delivered a stop work order. The order notified the Buckleys "to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project."

In August 1991, the Attorney General sent a letter to the attorney who represented the Buckleys at the Commission hearing. The letter stated that "the Commission denied their permit application to develop the rear portion of their lot. . . . Despite the denial and a stop work notice . . . the Buckleys have continued to perform grading and filling on the site in violation of the Coastal Act."

In November, after a County geologist observed an unstable natural slope on the rear of the lot and the County ordered the Buckleys to abate the landslide that was occurring there, they resumed grading. They also filed for an emergency permit with the Commission on the basis that there was a landslide condition that needed immediate attention. An engineer from the Commission and a geologist from the City inspected the lot and concluded that the landslide condition did not pose an imminent threat but was a normal consequence of the rains. The engineer and the geologist also concluded that the grading plan submitted by the Buckleys was not the

minimum necessary to mitigate the geological conditions. The Commission denied the emergency request on those grounds. The Buckleys continued grading from November 27, 1991, until the Commission issued the final stop-work order on December 5, 1991. It again stated that they had to "stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project."

The Buckleys filed this declaratory relief action in December 1991. The Commission subsequently filed an action for injunctive relief and civil penalties and fines. The Buckleys cross-complained in that case for declaratory relief and damages. The cases were consolidated, and the Buckleys' initial action was found to be the lead case. That matter was then severed from the rest of the action, and a court trial proceeded.

In the declaratory relief action, the court held that the Commission had no jurisdiction over the lot. The Buckleys' motion to sever that action from the cross-complaint was granted. The trial court entered a final judgment in the declaratory relief action, and the Commission filed a notice of appeal.

Subsequently, the Buckleys placed the lot on the market for a sale price of $1.4 million by order of the family law court.

Trial proceeded on the Buckleys' cross-complaint for damages. The trial court awarded $1,355,837 in damages for the permanent taking of their property, and $831,494.76 in attorney fees, appraiser fees and costs.

III. Contentions

We will address the following contentions raised by the Commission: (1) the Buckleys' complaint for declaratory relief challenging the Commission's jurisdiction over the property is barred by their failure to file a writ of mandate petition challenging the Commission's permit decision; (2) the trial court erroneously determined that the rear portion of the Buckleys' lot was exempt from the permit requirements of the Coastal Act; (3) the Buckleys' taking claim is barred by their failure to seek a writ of mandate challenging the Commission's jurisdiction; (4) even if the Commission wrongfully asserted jurisdiction over the property, its actions did not constitute a per se taking of the property; (5) section 30005 has no application to the issue of whether the Commission engaged in a taking; (6) the Buckleys are not entitled to attorney fees because there was no taking; and (7) the trial court was biased against the Commission. In light of our resolution of these issues, we need not discuss the Commission's argument that the trial court erroneously calculated the amount of damages.

IV. Discussion

A. *The Declaratory Relief Action Is Not Barred by the Failure to File a Writ Petition*

The Commission begins its argument with a citation to section 30801, which provides: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or

action has become final." Asserting that the Buckleys' permit application was denied on March 15, 1991, and that they failed to file a writ petition challenging the assertion of jurisdiction by May 15, 1991, or anytime after, the Commission contends that the declaratory relief action collaterally attacking the Commission's jurisdiction is barred as a matter of law.

The trial court rejected the Commission's argument on the ground that the Commission did not have jurisdiction over the lot at the time the permit was denied; and, therefore, the Buckleys were not required to file a writ petition. Thus, the question before us is whether the statutes creating the exemption from coastal development permits allow a partial lot exemption, which is the basis of the Commission's position; or whether an exemption of any portion of a lot is an exemption of the whole lot, which is the heart of the Buckleys' argument.

1. *Statutory language*

" ' "[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both

the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. . . . [Citations.]" ' [Citation.]" (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 186-187 [10 Cal.Rptr.2d 208, 832 P.2d 924].)

Section 30610.1 required, within 60 days of its effective date, January 1, 1980, the Commission to designate areas in the coastal zone where construction of a single-family residence on a vacant lot meeting certain criteria would not require a coastal development permit. "Areas shall be designated for the exclusion provided for in this section if construction of single-family residences within the area to be designated has no potential, either individually or cumulatively, for significant adverse impacts on . . . environmentally sensitive areas. . . . " (§ 30610.1, subd. (b).)

Subdivision (c) of section 30610.1 provides that no coastal development permit is required for the construction of a single-family residence on any vacant lot which meets certain criteria, including if it: "(2) Is a legal lot as of the effective date of this section and conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances."

Pursuant to section 30610.2, subdivision (a), a local government with jurisdiction over a lot issues a written certification that the lot is exempt from the coastal development permit requirement because the lot meets the criteria specified in subdivision (c) of section 30610.1.

According to the analysis of the proposed legislation by the Assembly Committee on Resources, Land Use, and

Energy, the Coastal Act required a permit for construction of any structure in the coastal zone. The requirement was "criticized as overly-stringent when applied to the construction of single-family residences in coastal areas which are already substantially developed for residential purposes." Pursuant to the proposed new sections, in unincorporated areas such as Malibu at that time, once the Commission designated specific zones, "all lots within such areas or zones would be exempt from the permit requirement for single-family residences."

The purpose of the legislation was to allow owners of lots in designated areas to build single-family residences without having to obtain a coastal development permit from the Commission. Sections 30610.1 and 30610.2 had the effect of eliminating the Commission's participation in the approval process for construction of single-family residences within the designated areas.

There is no provision that allows the Commission to designate a portion of a lot as being within sections 30610.1 and 30610.2. Both statutes use the term "a vacant lot." Once the Commission determined that a lot was within the single-family residence construction area, nothing in the statute permitted the Commission to retain jurisdiction over the decision to develop any part of that lot. If the Commission wanted to retain control over whether to allow improvements in the southwest corner of the Buckley lot, it had no alternative but to place the entire lot outside the area designated for single-family residence construction. By placing the lot within that area, the Commission forfeited its control and its discretion to approve or disapprove of construction on that lot.

To hold otherwise would not only add provisions to the statutes that were not included by the Legislature, it would also inhibit the legislative purpose of the statute. If a portion of a lot placed within the single-family residence construction area is subjected to the coastal development permit process, the owners must go through the Commission to improve their property. The very purpose of the statutes at issue here was to avoid that. We therefore hold that when the Commission, acting pursuant to section 30610.1, placed any portion of a lot within the single-family residence construction area, it placed the entire lot within that area. By placing a lot within the single-family residence construction area, the Commission relinquished jurisdiction over development decisions regarding the entire lot thereby.

2. *The Buckleys were not required to file a writ petition*

" '[A] matter within the commission's jurisdiction' " is any "quasi-judicial matter requiring commission action. . . . " (§ 30321.) Because the Commission had no role in the construction permit process regarding the Buckley lot, it follows that the Commission has no jurisdiction over the Buckley lot.

As stated in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 [109 P.2d 942, 132 A.L.R. 715], lack of jurisdiction is "an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." That is an apt description of the relationship between the Commission and the Buckleys' single-family residence construction on the lot.

Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. (*Summers v. Superior Court* (1959) 53 Cal.2d 295, 298 [1 Cal.Rptr. 324, 347 P.2d 668]; *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1723 [1 Cal.Rptr.2d 570]; *Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 333 [269 Cal.Rptr. 426].) Therefore, the fact that the Buckleys filed an application for a coastal development permit and the Commission denied the application did not confer on the Commission jurisdiction over the improvement of the lot. Because the Commission had no authority to deny the permit, the Buckleys were not required to seek judicial review of the denial. We do not disagree with any of the authorities cited by the Commission for the proposition that failure to obtain judicial review of a determination by an administrative agency by a timely petition for writ of administrative mandate renders the administrative action immune from collateral attack. (See, e.g., *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448 [31 Cal.Rptr.2d 559]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 602 [11 Cal.Rptr.2d 824]; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1498 [258 Cal.Rptr. 567].) We simply hold that the cases do not apply here.[4]

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[4] The Commission also cites a series of cases, *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13-14 [32 Cal.Rptr.2d 244, 876 P.2d 1043], among them, to argue that res judicata bars the Buckleys' declaratory relief action. We do not agree that Hensler would support such a statement, but we need not discuss it or any of the other cases cited to support this contention. Our conclusion that the Commission had no jurisdiction over any improvements on the lot completely resolves in favor of the Buckleys the issue of whether the declaratory relief action was barred.

The rule of exhaustion of administrative remedies does not apply where the subject matter lies outside the administrative agency's jurisdiction. (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827 [17 Cal.Rptr.2d 323]; *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1808 [41 Cal.Rptr.2d 123].) The Commission had no power to deny the Buckleys permission to improve any portion of their lot. Because it lacked power to make any determination, the denial of a permit to the Buckleys was a void act that could be set aside at any time. (See *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493 [165 Cal.Rptr. 825, 612 P.2d 915].)

B. *The Takings Claim Is Not Barred by the Failure to File a Writ Petition*

The Commission next argues that their failure to challenge the Commission's permit decision bars the Buckleys from claiming that the Commission's assertion of permit jurisdiction resulted in a taking of their property. The Commission cites the same authorities relied on in the preceding contention. This argument, like the earlier one, is based on the premise that the Commission had jurisdiction. Our conclusion that the Commission did not have jurisdiction when it denied the permit, and that the matter falls within an exception to the doctrine of exhaustion of administrative remedies, disposes of this issue as well.

C. *The Trial Court Erred in Finding That the Commission's Assertion of Jurisdiction Over the Buckley Lot Was a Taking*

After ruling that the Commission's prohibition against grading did not advance a legitimate state interest and denied the Buckleys any economically viable use of the lot, the trial court found that the Commission's assertion of jurisdiction over the development of the lot was a per se permanent regulatory taking of the Buckleys' property. The Commission is correct in its contention that the ruling by the trial court was erroneous, because the ruling is not supported by substantial evidence.

1. *The substantial evidence test*

Review of condemnation proceedings tried before the court requires the appellate court to determine whether there is any substantial evidence to support the findings. (*City of Commerce v. National Starch & Chemical Corp.* (1981) 118 Cal.App.3d 1, 18 [173 Cal.Rptr. 176].) The substantial evidence rule applies as well on review from inverse condemnation proceedings. (See *Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 605 [appellate court bound by implied finding of fact supported by substantial evidence].)

Substantial evidence is not any evidence, but substantial proof of the essentials which the law requires in a given case. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [51 Cal.Rptr.2d 907].) Substantial evidence has ponderable legal significance, is reasonable, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d

191].) We focus on quality, not quantity, because very little solid evidence might be substantial, while a host of extremely weak evidence might be insubstantial. (*Roddenberry v. Roddenberry, supra,* at p. 651.) Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*Ibid.*) The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. (*Kuhn v. Department of General Services, supra,* at p. 1633.)

2. *The takings law*

Governments are prohibited from taking private property for public use without compensation. (U.S. Const., 5th and 14th Amends; Cal. Const., art. I, § 19.) To obtain compensation, the property owner may bring an action for inverse condemnation. (*United States v. Clarke* (1980) 445 U.S. 253, 257 [100 S.Ct. 1127, 1130, 63 L.Ed.2d 373] [inverse condemnation is an action to recover compensation for taking of property by means other than condemnation proceedings].) In an inverse condemnation action, the property owner has the burden of alleging and proving the owner's property right and its infringement. (*Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 249-250 [266 Cal.Rptr. 891]; *People ex rel. Dept. Pub. Wks. v. Romano* (1971) 18 Cal.App.3d 63, 72, fn. 4 [94 Cal.Rptr. 839].)

The mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking. (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121,

126-127 [106 S.Ct. 455, 459, 88 L.Ed.2d 419].) The requirement that a person obtain a permit before engaging in a certain use of the property does not itself take the property; the very existence of a permit system implies that permission may be granted to allow the owner to use the property as desired. Even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred. (*Ibid.*; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 385 [114 S.Ct. 2309, 2316-2317, 129 L.Ed.2d 304] [land use regulation does not effect a taking if it substantially advances legitimate state interests or does not deny owner economically viable use of the land]; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015-1016 [112 S.Ct. 2886, 2893, 120 L.Ed.2d 798] [Fifth Amendment violated when land use regulation denies owner economically viable use of land]; *Agins v. Tiburon* (1980) 447 U.S. 255, 260-262 [100 S.Ct. 2138, 2141-2142, 65 L.Ed.2d 106].)

For example, in *Lucas v. South Carolina Coastal Council*, a statute entitled the "Beachfront Management Act," enacted after the property owner purchased two residential beach front lots, barred the owner from building any permanent habitable structures. The Supreme Court held that "[w]here the State seeks to sustain regulation that deprives the land of all economically beneficial use" (505 U.S. 1027 [112 S.Ct. at p. 2899]), the state must compensate the owner for taking the property. However, as noted by our Supreme Court in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774 [66 Cal.Rptr.2d 672, 941 P.2d 851], a regulation may effect a taking even if it

leaves the owner some economically beneficial use of the property. Kavanau cites to footnote 8 in *Lucas v. South Carolina Coastal Council,* wherein the United States Supreme Court left open the possibility of a taking where the deprivation caused by a regulation "is one step short of complete." (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at p. 1019, fn. 8 [112 S.Ct. at p. 2895.)

Whether the owner has been denied substantially all economically viable use of the property is a factual inquiry that requires the analysis of such factors as the economic impact of the regulation, interference with the landowner's reasonable, investment-backed expectations and the character of the government action. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175 [100 S.Ct. 383, 390, 62 L.Ed.2d 332].) The basis of the inquiry is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion. (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 497 [107 S.Ct. 1232, 1248, 94 L.Ed.2d 472].)

Temporary takings which deny a landowner all use of property are not different in kind from permanent takings, for which compensation is clearly required. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318 [107 S.Ct. 2378, 2387, 96 L.Ed.2d 250].) The *First Lutheran* court repeatedly used the term "all uses" to describe a temporary taking. Later United States Supreme Court permanent regulatory takings cases, such as those cited above, have employed expressions more favorable to the showing that must be made to establish a taking, such as " 'economically viable use of [the] land' " (*Dolan v. City of Tigard, supra,* 512 U.S. at p. 385 [114 S.Ct. at p. 2316]) and "all economically beneficial or productive use

of land" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at pp. 1015-1016 [112 S.Ct. at p. 2893]).

3. *The application of the substantial evidence rule and the law of takings to this case*

The trial court's determination that there was a permanent taking of the Buckleys' property was incorrect. After the trial court ruled that the Commission had no jurisdiction over the lot, the Commission's stop work orders no longer had any effect. Any taking that might have occurred was ended by that ruling. There is no basis in the facts, in the law, or in logic that would support the view that a permanent taking occurred in this case. We turn to the question of whether there was a temporary taking of the Buckley property.

The evidence established that until the County approved exhibit 31 after the landslide formed in March 1991, Buckleys had valid building and grading permits for the front portion of the lot. Pursuant to the County permits, the Buckleys or a subsequent owner were entitled to proceed with the construction of the 15,000-square-foot house that the Buckleys' plans called for. The Commission asserted jurisdiction only over the rear portion of the property, where the ravine is located. The Commission acknowledged that the front portion of the lot was subject to County jurisdiction pursuant to the Calvo exclusion, a point not in dispute after the exemption was issued by the County in October 1989. Indeed, the initial grading permit the Buckleys sought from the Commission concerned only the rear portion of the lot. The Buckleys, however, chose not to grade and chose to

build on only the front portion of the lot. Dale Glenn testified that the later grading and building plan, exhibit 31, was developed in part because the ravine had to be stabilized. However, the County had already approved the Buckleys' plan to build a 15,000-square-foot house on the property without requiring any grading in the ravine area. The Buckleys could have built or sold the property before submitting exhibit 31 to the County.

Subsequently, exhibit 31 was approved by the County. From this the Buckleys argue that the earlier grading and building plan, exhibit 30, was superseded and, because of the Commission's refusal to allow them to grade the rear of the lot they were not entitled to build at all after March 1991. However, the Buckleys did not establish that the County would not have been willing to allow them to execute the earlier approved plan, exhibit 30, after the Commission did not approve the application to grade the rear of the lot pursuant to exhibit 31.

Because the Buckleys could have developed the front portion of the lot, or sold the lot with the County permits in place, the grading restriction imposed by the Commission, though erroneous, did not prevent all economically viable or productive use of the lot even before the Buckleys obtained a successful result in the declaratory relief portion of the trial. Therefore, the record does not support a finding that there was a temporary taking in this case.

a. *The impact of the landslide on the taking analysis*

To support the trial court's ruling, Peggy Ann and John Buckley both assert that after the landslide developed in the ravine, the Commission's prohibition against grading the rear of the lot effected a taking of the entire lot because, at that point, the front portion of the property could not have been developed without grading the entire property. The evidence supports the position that the landslide changed the situation on the rear portion of the lot and made grading a necessity. The evidence does not support the argument that, as a result, a taking occurred.

Peggy Ann states that after the landslide, "any development of the Lot would require the landslide to be mitigated." Both respondents rely on the testimony of Dale Glenn, who stated that after the landslide she could not provide to the County a report required by the Los Angeles County Building Code, stating that no conditions on the property would adversely affect the adjoining properties. However, other portions of Ms. Glenn's testimony bring into question the Buckleys' premises: first that the grading plan they submitted to the Commission was the only plan that would have remedied the landslide, and second that the Commission's failure to approve that grading plan the Buckleys submitted caused them to be unable to build at all and thus effected a taking.

Glenn testified that exhibit 31 was designed to create more usable space for the Buckleys, to offset some of their

expense. However, she did not testify that after the Commission's rejection of the exhibit 31 grading plan she attempted to modify exhibit 31 in any way in order to obtain approval for grading the ravine area with perhaps only one or two pads.

The Glenn testimony undercuts the Buckleys' position, as does the testimony of the Commission's engineering geologist, Donald Kowalewsky. Kowalewsky testified that the rear portion of the lot could have been graded in a way that would have stabilized the ravine with substantially less grading than the Buckley's proposed grading plan. He recommended removing all the landslide material and additional earth to a depth of 12 feet, and replacing it with compacted fill. Drains would be placed within the fill to prevent the groundwater from building up behind the fill. The fill would be placed within a reinforcing geofabric that would stabilize the fill and prevent it from undergoing superficial instability such as the slide currently taking place on the property.[5] According to Kowalewsky, when finished, the slope would be landscaped to have a natural look. He stated that this proposal would require "substantially less grading" than the Buckleys' plan.

In fact, the Buckleys did not attempt to work with the Commission to develop a plan that would require less

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[5] The geofabric was described as "a webbed net of a specialized plastic material that does not deteriorate. . . . It is typically placed about two feet apart, vertically, and it provides additional strength to the soil such that the soils will not sheer or break across or through this fabric material."

grading of the ravine. The Commission's permit application reviewer, Barbara Carey, testified that the Buckleys' permit denial was not a denial of all development. The Buckleys had the option of submitting a different grading plan. At that point, the court commented that the Buckleys "did not want to." But, as noted by the Commission's counsel, the Buckleys had a duty to mitigate their damages. Carey stated that the Buckleys never applied for a grading permit with a plan for less development.

Carey also testified that, as a permit application reviewer, "something like" Kowalewsky's suggestion that the failed earth material be removed and replaced with a compact fill, reinforced by geofabric and subdrains "would more likely be recommended for approval."[6] She was also asked about Kowalewsky's idea that a retaining structure such as soldier piles be placed along the edge of the driveway. Again she stated that such a plan would be more likely to be recommended for approval, and she testified that it would be less intrusive to the environmentally-sensitive habitat area.

Therefore, the evidence at trial did not support the Buckleys' position. The grading plan the Buckleys wanted was not necessarily the only one that would accomplish the goal of stabilizing the ravine. The Commission's denial was not unreasonable, and no evidence

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[6] In her petition for rehearing, Peggy Ann argues that Kowalewsky's testimony was unreliable in part because Dale Glenn had testified that the County does not allow geofabric. At that time, however, it was the Commission, not the County, that the Buckleys had to work with in order to develop an approved grading plan for the rear of the lot.

indicated that the Commission would not entertain a different grading approach. The denial of the grading plan submitted to stabilize the landslide was not a taking.

b. *The effect of section 30005*

Both Peggy Ann and John contend that the Commission interfered with their efforts to abate the landslide, in violation of section 30005, which provides that no provision of the Coastal Act "is a limitation . . . [¶] . . . [¶] (b) On the power of any city or county . . . to declare, prohibit, and abate nuisances." Even if true, such violation of section 30005 could not have caused a taking, in light of our conclusion that the evidence does not show that the Commission was against any grading of the ravine whatsoever. The record shows that the Commission denied the first and only grading plan submitted by the Buckleys, one that, according to the testimony of the Buckleys' geological engineer, was designed to gain more usable land while stabilizing the ravine.

c. *The Buckleys' interpretation of the stop work orders was not reasonable*

Peggy Ann also argues that the Commission's stop work orders were not limited to the rear areas of the lot, but related to the entire lot. She cites in support the testimony of the Commission's enforcement officer, Pam Emerson, who admitted that the December 1991 stop work order did not state that it was limited to the ESHA area. However, Peggy Ann ignores other testimony on this point.

The March 1991 stop work order stated: "RE: Grading in a canyon, outside the exclusion area with valid coastal development permit." The order notified the recipient "to stop all work. Any additional unpermitted work on this site will be considered . . . a violation of the Coastal Act."

The June 1991 stop work order notified the Buckleys "to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project."

The August 1991 letter from the Office of the Attorney General to the attorney for the Buckleys at the Commission hearing stated that "the Commission denied their permit application to develop the rear portion of their lot. . . . Despite the denial and a stop work notice . . . the Buckleys have continued to perform grading and filling on the site in violation of the Coastal Act."

Finally, the December 1991 stop work order again stated that the Buckleys had to "stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project."

Although the June and December stop work orders do not refer specifically to the rear portion of the lot, the March stop work order did, as did the letter from the Attorney General's Office. Pam Emerson, the enforcement officer for the Commission, testified that the letters did not refer to the rear of the lot because the Commission knew that the Buckleys had a Calvo exclusion for the front portion of the lot.

John admitted that the Commission never stated that it was asserting jurisdiction over the entire lot. Peggy Ann testified that after the August 1991 letter, she believed that she had the right to develop the property, but she believed the Commission would never leave them alone. She admitted, however, that she did not contact the Commission to determine whether the stop work orders referred to the whole lot. In fact, no one contacted the Commission on behalf of the Buckleys to clarify this point – not the lawyer they hired to appear before the Commission, not the facilitator they hired to move their permit through the Commission, not the lawyers they hired to pursue this litigation. Moreover, John testified that they put in electricity, water, gas, a fence, a septic system and a foundation for the garage on the exempt portion of the lot, but there was no evidence that the Commission interfered with any of that work. Therefore, we conclude that there was no evidentiary basis for the Buckleys' position that the Commission was prohibiting them from doing any work on the lot.

d. *The Buckleys did not establish that the permits are no longer valid*

Peggy Ann contends that if the Buckleys were required to modify the approved County plans to accommodate a different grading plan after the change of jurisdiction from the County to the City of Malibu, they would probably have to start the permit process over again. However, the Buckleys did not establish whether the City of Malibu would in fact require them to start the process again.

The Buckleys' appraiser, Mr. Chin, testified that he did not check with the City or the County to determine whether the permits issued by the County were still valid at the time of trial. The Buckleys called Grant Lawseth, who is with the County Building and Safety Division, who testified that the City of Malibu was honoring building permits issued by the County, though he was not sure about grading permits. On cross-examination, he testified that he did not know whether the Buckleys tried to determine whether their County permits are still valid. In fact, the court itself noted that there was no evidence on the question of whether the City of Malibu would honor the permits issued to the Buckleys. It was, however, the Buckleys' burden to establish that, and there was no evidence that they could not still build according to the County-approved plans.

e. *The Landgate Decision*

Finally, the recent decision of our Supreme Court in *Landgate, Inc. v. California Coastal Com., supra,* 17 Cal.4th 1006 precludes any monetary recovery by the Buckleys. Boiled down to its essence, *Landgate* held that, under the facts presented, an incorrect decision of the Commission in asserting jurisdiction over property did not constitute a temporary taking.

(1) *Facts*

Landgate is a developer which purchased land in Malibu that was subject to the Coastal Act, and thus the concurrent jurisdiction of the County and the Commission.

Landgate proposed to grade its north lot and build a large residence, which would include a guest house and a swimming pool. The County gave its blessing to the project.

Landgate applied to the commission for a permit, which was denied on three grounds: (a) the visual impact of the project on the environment, (b) excessive amounts of grading, and (c) an illegal lot line.

Of the three reasons, the lot line adjustment was the sticking point. *Landgate* had previously received County permission to revise the lot lines of property it owned because of a road which had been constructed in the area. The Commission regarded the County's action as illegal. The County believed that the Commission had waived its right to object by acquiescing in the construction of the road.

Subsequently, *Landgate* revised its project to alleviate any problems regarding visibility and grading. The Commission denied the project once again, with the lot line adjustment still being the major problem.

Landgate then filed two actions. The first was a writ of mandate based on the argument that the Commission had no jurisdiction over the lot line adjustment. The second was a complaint for damages for a "taking" without just compensation.

The trial court granted the writ of mandate, holding that the lot line adjustment was not within the Commission's purview. The trial court ordered the Commission to rehear the application on its merits. The court of appeal affirmed, holding that the Government Code did not

authorize the Commission to invalidate a legally recorded lot line adjustment to which the Commission had given tacit approval.

In February of 1993, *Landgate*'s project (modified again) was approved, subject to conditions relating to height limits, drainage, color and landscaping, to which *Landgate* did not object.

Both sides then filed for summary adjudication on *Landgate*'s "takings" complaint. The trial court found that the Commission's erroneous assertion of jurisdiction prevented the use of the property from February of 1991 until February of 1993 and awarded damages of $155,657. The Commission appealed. *Landgate* also appealed that the damages were too low.

(2) *The decision*

The Supreme Court granted review to decide a single issue: Whether the Commission's mistaken assertion of jurisdiction led to a temporary taking.

For better or for worse, in a four-to-three decision, the majority held that a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. (*Landgate, Inc. v. California Coastal Com., supra,* 17 Cal.4th 1006, 1022.)[7]

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[7] Justice Chin and Justice Rogers each wrote separate dissents, and each was joined by Justice Baxter. The thrust of

The Supreme Court stated that a mere assertion of regulatory jurisdiction did not equate to a regulatory taking. (17 Cal.4th at p. 1027.) "[W]hen the Commission determined that *Landgate*'s lot was not legal, it could legitimately litigate the lot line question without offending the takings clause. The Commission could not be said to have reached a final and authoritative determination of the development on *Landgate*'s lot until after the dispute about the legality of the lot had been resolved." (*Id.*, at p. 1029.)

Further, the Supreme Court said that the reality of the application process is that, on occasion, disputes will lead to judicial proceedings. However, so long as such proceedings are not brought on by the arbitrary or capricious acts of the governmental agency, the delay in approval occasioned by judicial proceedings is simply an unfortunate part of the normal process. (17 Cal.4th at pp. 1029-1032.)

(3) *Application of Landgate*

As in *Landgate*, the present case likewise involves the mistaken assertion of jurisdiction by the Commission. In the previous part of this opinion at part A.1., we have held, in a question of first impression, that the Commission could not exempt a lot from having to obtain a

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each dissent is that when a regulatory agency prohibits all use of a particular property and the owner is forced to sue the agency to achieve the correct result, a compensable taking has occurred. Further, litigation over land use is not a "normal delay."

coastal development permit and yet still retain jurisdiction over another part of that same lot. Under the *Landgate* test, no taking is involved so long as there is an objective and sufficient connection "between the land use regulation in question and a legitimate governmental purpose, so that the former may be said to substantially advance the latter. [Citations.]" (17 Cal.4th at p. 1022.)

Similar to *Landgate*, the present matter essentially involved a clash of wills between the County and the Commission and, to a certain extent, the Buckleys. However, the record does not support a finding that there was anything improper about the Commission's position that the rear portion of the lot was indeed an environmentally sensitive habitat area. Nor is there any support for the proposition the Commission's motives were in bad faith. In any event, as stated in *Landgate*, we are not to look at the subjective motive of the government agency but instead to determine whether objective evidence supports the connection between the regulation and a legitimate purpose. (17 Cal.4th at p. 1022.) As previously stated, the evidence shows that there was indeed a connection between the land use regulation and a legitimate governmental purpose in attempting to control the rear portion of the Buckleys' property.

f. *Conclusion as to taking*

We conclude that the Buckleys did not establish that the assertion of jurisdiction and denial of the grading permit was either a permanent or a temporary taking. There was, therefore, no basis for the trial court's award of damages, which is reversed.

4. *The Buckleys are not entitled to attorney fees*

Code of Civil Procedure section 1036 provides: "In any inverse condemnation proceeding the court rendering judgment for the plaintiff by awarding compensation . . . shall determine and award or allow to the plaintiff, as a part of that judgment . . . a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

Inasmuch as we have reversed the compensation award because the evidence did not support a taking, we must reverse as well the $831,494.76 in attorney fees, appraisal fees and costs awarded pursuant to section 1036 of the Code of Civil Procedure. (*City of Los Angeles v. Property Owners* (1982) 138 Cal.App.3d 114, 121 [187 Cal.Rptr. 667], review den. and cert. den.) Under the plain language of the statute, since the Buckleys will not receive a compensation award for inverse condemnation, they are not entitled to attorney fees.

5. *The trial court was not biased against the Commission*

The trial court several times used phrases such as "government tyranny" and "tyrannical behavior" when referring to the acts of the Commission. Despite these statements, our review of the massive record in this case

does not indicate that the court was biased against the Commission to the extent that reversal is required on that ground. (Contra, *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237 [42 Cal.Rptr.2d 440].)

Disposition

The judgment in the declaratory relief action (No. BC044916) is affirmed. The judgment in the cross-complaint for damages (No. SC015614) and the award of attorney fees and costs are reversed. Each party is to bear its own costs on appeal.

Boren, P.J., and Zebrowski, J., concurred.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

December 28, 1998

BUCKLEY, PEGGY ANN

Plaintiff-Respondent

v.

CALIFORNIA COASTAL
COMMISSION

Defendant-Appellant

B081544
Los Angeles County No. BC044916

THE COURT:

Petition[s] for rehearing [are] denied.

cc: All Counsel
File

APPENDIX C

Second Appellate District, Division Two, No. B081544
S066022

IN THE SUPREME COURT OF CALIFORNIA

PEGGY ANN BUCKLEY Et Al., Respondents

v.

CALIFORNIA COASTAL COMMISSION, Appellant

(Filed Feb. 24, 1999)

Respondents' petition for review DENIED.

Baxter, J., Chin, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

APPENDIX D

Second Appellate District, Division Two No. B081544
S066022

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA COASTAL COMMISSION, Appellant

v.

PEGGY ANN BUCKLEY et al., Respondents

(Filed Jul. 8, 1998)

The above-entitled review is hereby transferred to the Court of Appeal, Second Appellate District, Division Two, with directions to vacate its decision and to reconsider the cause in light of *Landgate, Inc.* v. *California Coastal Com.* (1998) 17 Cal.4th 1006.

/s/ George
Chief Justice

/s/ Mosk
Associate Justice

/s/ Kennard
Associate Justice

/s/ Werdegar
Associate Justice

/s/ Chin
Associate Justice

/s/ Brown
Associate Justice

/s/ _____
Associate Justice

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEGGY ANN BUCKLEY and JOHN W. BUCKLEY, Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Defendants.	CASE NO. BC044916 [ ] STATEMENT OF DECISION [Cal. Rules of Ct., Rule 232(c)] (Filed Nov. 18, 1993)

Trial pursuant to this Court's bifurcation order of April 5, 1993 came on regularly for hearing, the Honorable William Huss, Judge presiding, on August 23, 1993 on the following issues:

> (1) Whether or not the entire lot owned by plaintiffs Peggy Ann Buckley and John W. Buckley, located at 6815 Dume Drive Malibu, California ("the Lot") is exempt from Coastal Development Permit requirements; and
>
> (2) Whether or not the California Coastal Commission ("the Commission") may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County of Los Angeles ("the County") with respect to the Lot.

Appearing for plaintiffs Peggy Ann Buckley and John W. Buckley were Eliot G. Disner, Esq. and Beverly Tillett Pine, Esq. Appearing for defendant California Coastal

Commission was Terry Fujimoto, Esq. Appearing for defendant the County of Los Angeles was Paul I. Yoshinaga, Esq.

Documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

1. With regard to the issue of whether or not the Lot in its entirety is exempt from Coastal Development Permit requirements, the Court's decision is that the entire Lot is exempt from the Coastal Development Permit requirements of the Coastal Act.

a. The Court has based its decision on the following facts:

1. In January, 1988, the Buckleys purchased the Lot which consisted of a vacant residential lot on which they planned to build a single-family residence (Buckley decl. ¶ 3).

2. The Lot is located in a developed single-family residential community (Supp. Buckley decl. ¶ 2).

[Text Deleted In Original]

4. On October 24, 1989, the County certified that "the [L]ot and the proposed single-family residence meets the requirements of Section 30610.1(c) of the Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act" (Plaintiffs' Ex. 514).

5. The County timely sent a copy of the Certificate of Exemption to the Commission (Admitted in Commission's Answer, ¶ 10), which went unchallenged by the Commission (undisputed).

6. Between October, 1989 and March, 1991, the County then issued grading and building permits calling for the grading and construction of a single-family residence on the Lot (Plaintiffs' Ex. 522).

7. On October 5, 1990, the Buckleys applied to the Commission for a coastal development permit which was denied by the Commission on March 15, 1991. The Buckleys did not appeal the Commission's denial by way of petition for writ of mandate (undisputed).

8. In adopting the Calvo exclusion amendments to the Coastal Act (PRC §§ 30610.1 and 30610.2), the Assembly Committee on Resources, Land Use and Energy noted that "[w]here the residential character of an area has already been established, it is asserted there is little public benefit to be achieved by requiring lot owners to obtain coastal permits before building single family homes." Legislative Intent Service, Ex. 3a, pp. 1-2 (Plaintiffs' Ex. 1 to August 19, 1993 Decl. of Burtram Johnson).

b. The legal basis for the Court's decision is:

1. No coastal development permit is required for the construction of a single-family residence on any existing vacant lot meeting specified area and lot criteria (PRC § 30610.1(a)).

2. The County had determined that the Lot met the statutory requirements for exemption from coastal development permit requirements pursuant to PRC

§ 30610.1(c) and issued a Certificate of Exemption from the coastal development permit requirements of the Coastal Act for said Lot in accordance with PRC § 30610.2. The commission did not challenge the County-issued Certificate of Exemption pursuant to CCP 1085 (undisputed).

3. The Commission cannot assert jurisdiction to the rear portion of the Lot based upon Map 96 of the Calvo AB 643 Final Adopted Maps (Plaintiffs' Ex. 504) because the Minutes of the Coastal Commission Meeting for January 22-24, 1980 (Commission's Ex. 2 to the Decl. of Priscilla Goehler) approved and adopted only the cross-hatched areas shown on the Calvo AB 643 Final adopted Maps pursuant to PRC § 30610.1. The portion of the Lot over which the Commission purports to assert jurisdiction here is not within such cross-hatched areas and was not specifically referred to in said minutes.

4. As to the portion of the Lot over which the Commission purports to assert jurisdiction (the rear portion of the Lot), the evidence fails to support the Commission's claim that it falls within an environmentally sensitive area as defined by PRC § 30107.5 or that designation of the rear portion of the Lot as such was officially approved and adopted by the Commission.

5. The evidence also fails to support the Commission's claims that the rear portion of the Lot falls within a Sensitive Coastal Resource Area as defined by PRC § 30116, or that the Commission recommended to the Legislature that the area be designated as such, or that the Legislature so designated the area as such by

statute, pursuant to PRC § 30502 in accordance with PRC § 30502.5 (undisputed).

6. The Commission's *res judicata* defense, based upon *California Coastal Commission v. Superior Court (Ham)* (1989) 210 Cal. App. 3d 1488, is insufficient because the Commission had no valid claim to subject matter jurisdiction over the Lot at the time it denied plaintiffs' application for a coastal development permit. *Id.* at 1501. The Certificate of Exemption applied to the entire Lot and therefore there was no administrative remedy plaintiffs had to pursue because the Commission exceeded its authority obviating the need for any further administrative remedy.

2. With regard to the issue of whether or not the Commission may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County with respect to the Lot, the Court's decision is that the Commission has no authority to limit or interfere in any way with the power of defendant County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no effect.

a. The Court based its decision on the following facts:

1. On March 26, 1991, the Commission hand delivered a stop work order referenced "Violation File Number: V-5-MAL-91-025" to plaintiffs notifying them that no grading would be permitted on the property, that a Coastal Permit had not been issued for the project and

that, any additional unpermitted work on the site would be considered a knowing and intentional violation of the Coastal Act which would subject plaintiffs to heavy monetary fines and penalties (Plaintiffs' Ex. 517).

2. On June 11, 1991, the Commission hand delivered a second stop work notice with respect to the Lot (Plaintiffs' Ex. 518).

3. On November 12, 1991, the Department of Public Works for the County ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition on the Lot identified in the geotechnical reports reviewed by the County (Plaintiffs' Ex. 524).

4. On December 5, 1991, the Commission hand delivered a third stop work notice with respect to the entire Lot (Plaintiffs' Ex. 519).

5. On March 6, 1992, the Department of Public Works for the County of Los Angeles again ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition which had developed on the Lot (Plaintiffs' Ex. 531).

b. The legal basis for the Court's decision is:

1. The Commission has no authority to limit in any way the power of the County to declare, prohibit and abate nuisances (PRC § 30005), including the issuance of any stop work orders.

2. The Commission cannot legally claim jurisdiction over any portion of the Lot (paragraphs 1 b. 1-6 are incorporated herein by reference).

Judgment is hereby ordered to be entered as follows:

1. The Lot in its entirety is exempt from the Coastal Development Permit requirements of the Coastal Act, PRC § 30000 *et seq.*

2. The Commission has no authority to limit or interfere in any way with the power of the County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no force and effect.

Dated: NOV 18 1993

/s/ William Huss
Judge of the
Superior Court

Prepared and submitted by:

SHAPIRO, POSELL, ROSENFELD & CLOSE
A Professional Corporation
2029 Century Park East, Suite 2600
Los Angeles, California 90067
(310) 277-1818

By /s/ Beverly Tillett Pine
Beverly Tillett Pine
One of Plaintiffs' Attorneys

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEGGY ANN BUCKLEY and JOHN W. BUCKLEY, Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Defendants.	CASE NO. BC044916 JUDGMENT AFTER TRIAL BY COURT ON BIFURCATED ISSUES (Filed Dec. 17, 1993)

Pursuant to this Court's bifurcation order of April 5, 1993, trial commenced before the Honorable William Huss, Judge Presiding, on August 23, 1993 on the following issues:

> (1) Whether or not the entire lot owned by plaintiffs Peggy Ann Buckley and John W. Buckley, located at 6815 Dume Drive, Malibu, California ("the Lot") is exempt from Coastal Development Permit requirements; and
>
> (2) Whether or not the California Coastal Commission ("the Commission") may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County of Los Angeles ("the County") with respect to the Lot.

Appearing for plaintiffs Peggy Ann Buckley and John W. Buckley were Eliot G. Disner, Esq. and Beverly Tillett Pine, Esq. Appearing for defendant California Coastal

Commission was Terry Fujimoto, Esq. Appearing for defendant the County of Los Angeles was Paul I. Yoshinaga, Esq.

Documentary evidence having been presented by both parties, and the cause having been argued and submitted for decision, and the Court having filed its Statement of Decision on Nov. 18, 1993, 1993:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The Lot in its entirety is exempt from the Coastal Development Permit requirements of the Coastal Act, PRC § 30000 *et seq.*

2. The Commission has no authority to limit or interfere in any way with the power of the County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no force and effect.

Dated: DEC 17 1993

/s/ William Huss
Judge of the Superior Court

APPENDIX G

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CALIFORNIA COASTAL COMMISSION, Plaintiff, vs. PEGGY ANN BUCKLEY and JOHN BUCKLEY, Defendants.	CASE NO. SC015614/ BC044916 STATEMENT OF DECISION
PEGGY ANN BUCKLEY and JOHN BUCKLEY, Cross-Complainants, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Cross-Defendants.	(Filed Apr. 6, 1995)

On December 20, 1991, Peggy Ann Buckley and John W. Buckley ("the Buckleys") filed Case Number BC 044 916. Thereafter, on March 5, 1992, the California Coastal Commission ("Commission") filed Case Number SC 015 614. On May 11, 1992, the Buckleys filed a Cross-Complaint in Case Number SC 015 614 seeking declaratory relief identical to that in Case Number BC 044 916 and, in addition, damages for an unlawful taking of their property. Case Number SC 015 614 was transferred to this

Court from the West District of the Los Angeles County Superior Court. Thereafter, on April 15, 1993, the two cases were ordered consolidated for trial on bifurcated legal issues.

The Court, by its Statement of Decision on November 18, 1993, in Case No. BC044916 (incorporated by reference herein), found that an undeveloped lot located at 6815 Dume Drive, Malibu, California ("the Lot") owned by cross-complainants the Buckleys was exempt from the jurisdiction of the Commission. On December 17, 1993, the Court ordered the cases severed and the remainder of Case Number SC 015 614 was set for trial.

By Order of November 28, 1994, the Court summarily adjudicated that the Commission's assertion of jurisdiction over the Lot constituted a per se taking of the Lot under the Fifth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 19 of the California Constitution, for which just compensation must be paid.

Between January 4 and January 26, 1995, trial ensued with respect to the following unresolved issues:

> (1) the nature, extent and duration of the Commission's regulatory taking of the Lot.
>
> (2) The damages caused to the Buckleys by the Commission as a consequence of its unlawful taking of the Lot.

At trial Eliot G. Disner, Esq. appeared for John W. Buckley. Thomas M. Banks, Esq. appeared for Peggy Ann Buckley. Terry T. Fujimoto, Esq. and Alan V. Hager, Esq. appeared for defendant Commission. Documentary evidence was introduced and oral testimony taken on behalf

of the respective parties. On January 31, 1995, the Court personally viewed the Lot with Messrs. Disner, Banks and Fujimoto in attendance. Thereafter, written arguments were filed with the Court and the case then submitted for decision. On March 16, 1995, the Court held a further hearing at which Messrs. Disner, Banks, Fujimoto and Hager appeared.

The Court, having thus considered all the evidence and having heard the arguments of counsel and being now fully advised, finds in this Statement of Decision the following facts:

1. By its Statement of Decision filed November 18, 1993 in Case Number BC 044 916, this Court made the following findings which are adopted herein:

> (a) In January, 1988, the Buckleys purchased the Lot which consisted of a vacant residential lot on which they planned to build a single-family residence.
>
> (b) The Lot is located in a developed single-family residential community.
>
> (c) On October 24, 1989, the County of Los Angeles ("County") certified that "the [L]ot and the proposed single-family residence meets the requirements of Section 30610.1(c) of the Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act". On that date, the County issued a Certificate of Exemption, pursuant to Public Resources Code §30610.2. The County timely sent a copy of said Certificate to the Commission which went unchallenged by the Commission within the time period required therefor.

(d) Between October, 1989 and March, 1991, the County then issued grading and building permits calling for the grading and construction of a single-family residence on the Lot.

(e) The Commission has no authority to limit in any way the power of the "County to declare, prohibit and abate nuisances (PRC §30005), including the issuance of any stop work orders".

(f) The Commission cannot legally claim jurisdiction over any portion of the Lot.

2. On August 15, 1989, the Commission first attempted to exercise its jurisdiction on the Lot. It then and thereafter issued to the Buckleys written threats and stop work notices, the intent being to prevent any development thereon. The Commission suggested that the Buckleys obtain a County Certificate of Exemption for the Lot, which they did. The Commission then never challenged the issuance of said Certificate. At all pertinent times, no portion of the Lot could be developed without grading it in its entirety, in accordance with the grading plans approved and permitted by the County for the development of the entire lot.

3. As of at least October 24, 1989 then, the Commission had no jurisdiction over the Lot, or any part thereof. Thereafter and to the present, the Commission has continued to assert its claim of jurisdiction over the Lot and prevented development thereon. The Commission has represented to the Court, through its counsel, that it will continue to claim its jurisdiction until all appeals are exhausted.

4. The assertion of jurisdiction by the Commission over the Lot constitutes a per se taking thereof. Said taking did not advance the legitimate interests of the State of California and was arbitrary and capricious. By its taking, the Commission also denied to the Buckleys any economically viable use of the Lot.

5. The Buckleys in the third cause of action to their Cross-Complaint alleged a conflict in jurisdiction over the development of the Lot between the County and the Commission, seeking therein a declaration to determine which entity has jurisdiction over development of "the Lot". The Court now finds that the County has jurisdiction over the development of "the Lot" to the same degree that it had jurisdiction as of October 24, 1989, the date said Calvo Certificate of Exemption was issued.

6. The taking of the Lot by the Commission was permanent.[1]

7. In March, 1991, a landslide developed on "the Lot". On March 26, 1991, the Commission hand delivered a stop work order referenced "Violation File Number: V-5-MAL-91-025" to plaintiffs notifying them again that no grading would be permitted on the property, that a Coastal Permit had not been issued for the project and that any additional unpermitted work on the site would be considered a knowing and intentional violation of the Coastal Act, which would subject plaintiffs to heavy monetary fines and penalties. On June 11, 1991, the Commission hand delivered a second stop work notice with

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[1] The appropriate measurement and elements for a *temporary* taking do not apply.

respect to the Lot. On November 12, 1991, the Department of Public Works for the County ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition on the Lot identified in the geotechnical reports reviewed by the County. On December 5, 1991, the Commission hand delivered a third stop work notice with respect to the entire Lot. These arbitrary and capricious acts of the Commission are the proximate cause of the landslide and egregious erosion which are continuing on the property, resulting in permanent damage, in addition to potential liability to the owners of the property adjoining the landslide. The Court has confirmed that the landslide and erosion continues to this day.

8. The Buckleys had intended to sell the Lot in or about the Fall of 1989. John Buckley testified that after he and his wife, Peggy Ann, acquired the Lot in January, 1988, he suffered serious health problems and contemplated slowing down, such that he was not then willing to assume the financial burden (that he could have otherwise borne), for the 15,000 square foot house they had planned to build there. However, the Buckleys were unsuccessful at marketing the Lot after the Fall of 1989, due to the Commission's unlawful taking of the Lot.

9. The date of valuation is May 1, 1990. Given the average time it took in the Fall of 1989 to sell undeveloped property in Malibu, the Buckleys would reasonably have done so at or about May 1, 1990, but for the Commission's unlawful taking of the Lot.

10. The Buckleys had a duty to mitigate their losses, that is attempt to keep the erosion from adjacent

undisputed jurisdiction areas, which they did. The Buckleys had no obligation to mitigate by applying to the Commission a second time for a Coastal Development Permit because it would have been futile to do so and because the Commission had no jurisdiction in the first place.

11. For purposes of valuation, there is no "comparable" market for the Lot, as that term is defined in Evidence Code §816. The properties chosen by the testifying experts provide guidance to the Court in its determination of value, but none is "sufficiently alike in respect to character, size, situation, and usability" to the Lot. There is no evidence that the other properties are sufficiently similar to the Lot in topography or view. Also, none of the chosen properties included plans and permits to construct a 15,000 square foot or similar residence. Further, none of the other properties was shown to be free of the Commission's jurisdiction (by the applicability of a Calvo Certificate of Exemption or otherwise), nor did any have extensive erosion or landslide damage like the Lot, nor was any involved in continuing litigation with the Commission (with one exception).

12. The valuation of the Lot on May 1, 1990 is based on the assumption that the highest and best use of the Lot then was its development pursuant to the plans and permits issued by the County of Los Angeles at or about that time. Those plans and permits would have permitted the expansion of the usable acreage of the Lot from 1.2 to at least 1.75 acres and the construction of a 15,000 square foot residence thereon.

13. The valuation of the Lot now is also based on its highest and best use, which is believed to be its value to a speculator who will need to remedy the landslide, wait until the conclusion of this case when the issue of the Commission's lack of jurisdiction is finally resolved, and probably start the planning and permitting process anew to conform to laws and regulations not applicable to the Lot in 1990.

14. Pursuant to Evidence Code §823, the Court takes into account, inter alia, the following evidence to determining valuation that is just and equitable at both times:

(a) other properties compared and contrasted to the Lot by the expert witnesses, including developed properties with the value of their respective developments extracted;

(b) the estimates of real estate brokers whose opinions were reported;

(c) the expert assumptions made about the risks that a reasonable buyer would now be likely to assume in light of the pendency of this litigation;

(d) estimates of the marketability of the Lot;

(e) the effect of the physical condition of the Lot;

(f) the effect of the present doubtful status of the plans and permits for the Lot; and

(g) the opinions of value provided by the expert witnesses and by owner John Buckley.

15. Taking the foregoing factors into account, the value of the Lot as of May 1, 1990 was $1.2 Million. The present value of the Lot is $250,000.

16. Since the Buckleys planned to *sell* the Lot, rather than develop and keep it, just compensation here is the sum of:

(a) the difference in the value of the Lot on May 1, 1990 and the date of Judgment herein, during which the Buckleys involuntarily owned the Lot;

(b) the monies lost from the inability of the Buckleys to use the proceeds they would have received upon the sale of their Lot, calculated per CCP §§[1268.311] and 1268.350;

(c) the costs incurred to hold and maintain the Lot after the taking, which would not have been incurred but for the taking;

(d) the costs incurred dealing with the Commission after the taking, in a futile attempt by the Buckleys to win its approval, which costs also would not have been incurred but for the taking; and

(e) the reasonable attorney, appraisal and engineering fees and costs incurred, per CCP §1036.

17. The damages proximately caused to the Buckleys by the unlawful taking of their Lot by the Commission are as follows:

(a) $950,000, the difference in the Lot's value on May 1, 1990 ($1,200,000) and its value at the time of trial ($250,000);

(b) prejudgment interest of $306,698;

(c) holding costs of $48,130, plus interest of $8,139 thereon;

(d) expenses and costs related to dealing with the Commission of $35,992, plus interest of $6,878 thereon; and

(e) attorneys', consultant and related fees and costs in a sum to be determined prior to the entry of Judgment herein.

18. The Buckleys are entitled to recover the sum of $1,355,837, excluding attorneys and related fees and costs.

The legal basis for the Court's Decision is:

1. Pursuant to PRC §30005, the Commission has no authority to limit in any way the power of the County to declare, prohibit and abate nuisances, including the issuance of an stop work orders. Furthermore, the Lot in its entirety is exempt from the Coastal Development Permit requirement of the Coastal Act, PRC §30000 *et seq*. Therefore, the acts of the Commission constituted a taking under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I, Section 19 of the California Constitution.

2. The County determined that the Lot met the statutory requirements for exemption from coastal development permit requirements, pursuant to PRC §30610.1(c), and issued a Certificate of Exemption from the coastal development permit requirements of the Coastal Act for said Lot in accordance with PRC §30610.2. The Commission did not challenge the County-issued Certificate of Exemption, pursuant to CCP §1085.

3. There was a permanent taking of the Lot by the Commission. *Lucas v. South Carolina* (1992) ___ U.S. ___, 112 S.Ct. 2886, *San Diego Gas & Electric Company v. City of San Diego* (1981) 450 U.S. 621.

4. The Buckleys had a duty to mitigate their losses, which they did. The Buckleys are also entitled to recover the costs they incurred in so doing. *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250.

5. The determination of just compensation in a takings case is fact intensive *Florida Rock Industries, Inc. v. U.S. (Fed. Cir. 1994) 18 F.3d 1560.*

6. The amount of damages related to the permanent taking here is the difference in value of the Lot as of May 1, 1990 and the value as of the time of the litigation. *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, *Lucas, supra.* Also included in the damage award are the holding costs. *United States v. General Motors Corp.* (1945) 323 U.S. 373.

7. The Buckleys are entitled to prejudgment interest. *Glendale Redevelopment Agency v. Parks,* (1993) 18 Cal. App. 4th 1409. This is calculated by multiplying the difference in the Lot's value between May 1, 1990 and this date by the applicable rate of earnings of the Surplus Money Investment Fund (CCP §§1268.311 and 1268.350).

8. Pursuant to CCP §1036, the Buckleys are entitled to reimbursement of their attorneys fees and related fees and costs in this inverse condemnation proceeding.

IT IS SO ORDERED.

Dated: April 6, 1995

/s/ William Huss
WILLIAM HUSS
Judge

APPENDIX H

SUPERIOR COURT FOR THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

CALIFORNIA COASTAL COMMISSION, Plaintiff, vs. JOHN BUCKLEY, PEGGY ANN BUCKLEY, and DOES 1-50 inclusive, Defendants.	CASE NO. SC015614/ BC044916 JUDGMENT
JOHN W. BUCKLEY, PEGGY ANN BUCKLEY, Cross-Complainants, vs. CALIFORNIA COASTAL COMMISSION; COUNTY OF LOS ANGELES, and DOES 1-50, inclusive, Cross-Defendants.	(Filed Jul. 12, 1995)

On December 20, 1991, Peggy Ann Buckley and John W. Buckley ("the Buckleys") filed Case Number BC 044 916. On March 5, 1992, the California Coastal Commission ("Commission") filed Case Number SC 015 614. On May 11, 1992, the Buckleys filed a Cross-Complaint in Case Number SC 015 614 seeking declaratory relief identical to that sought in Case Number BC 044 916 and, in addition, sought damages for the claimed unlawful taking of their property by the Commission. Case Number SC 015 614

was transferred to this Court from the West District of the Los Angeles County Superior Court. Pursuant to Stipulation of counsel on April 5, 1993, Case Number SC 015 614 was consolidated with Case Number BC 044 916, and the issues tried and judgment entered in Case Number BC 044 916 are now res judicata in Case Number SC 015 614.

The Court thereafter, in Case Number BC 044 916, found that an undeveloped lot located at 6815 Dume Drive, Malibu, California ("the Lot") owned by the Buckleys was exempt form the jurisdiction of the Commission (November 18, 1993 Statement of Decision, incorporated by reference herein).

The Court thereafter, in Case Number SC 015 614, summarily adjudicated that the Commission's assertion of jurisdiction over the Lot constituted a per se taking of the Lot under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I, Section 19 of the California Constitution, for which just compensation must be paid (November 28, 1994 Order incorporated by reference herein).

Pursuant to this Court's Order of December 17, 1993, trial of the remaining issues in Case Number SC 015 614 commenced on January 4, 1995. The issues left to be resolved at said trial were:

> (1) The nature, extent and duration of the Commission's regulatory taking of the Lot.
>
> (2) The damages caused to the Buckleys by the Commission's unlawful taking of the Lot.

At trial Eliot G. Disner, Esq. appeared for John W. Buckley. Thomas M. Banks, Esq. appeared for Peggy Ann

Buckley. Terry T. Fujimoto, Esq. and Alan V. Hager, Esq. from the California Department of Justice appeared for the Commission.

The Court, having considered all of the evidence, both oral and documentary, having personally viewed the Buckleys' property, and after considering the written and oral arguments of counsel, entered its Statement of Decision in this matter on April 6, 1995 (which is also incorporated by reference herein).

The Buckleys' Motions for Attorney's Fees and Costs reasonably incurred in connection with this proceeding, pursuant to C.C.P. §§1021.5 and 1036, and came on for hearing on May 26, 1995. The Court having considered all of the evidence with respect thereto, as well as having considered the written and oral arguments of counsel, then ruled that the Buckleys' fees, costs, disbursements and expenses actually incurred by them or their attorneys in this consolidated proceeding have been reasonable and that they are entitled to reimbursement therefor, specifically as set forth hereinbelow.

In accordance with the foregoing, it is HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Commission has no jurisdiction over the Lot. To the extent that it attempted to exert jurisdiction over the Lot, or any part of it, it did so improperly. The Commission's actions have not substantially advanced any legitimate state interests, instead denied to the Buckleys the economically viable use of the Lot. Therefore, the Commission's assertion of jurisdiction over the Lot constitutes a per se taking of the Lot under the 5th and 14th

Amendments of the United States Constitution and Article I, Section 19 of the California Constitution;

2. The County of Los Angeles ("County") has jurisdiction over the Lot to the same degree that it had jurisdiction as of October 24, 1989, as if the Commission had never attempted to assert its jurisdiction thereover;

3. The Commission may not interfere with, or limit in any way, any effort by the County to declare, prohibit or abate any nuisance on the Lot;

4. The Commission shall pay to the Buckleys just compensation caused by said taking in the sum of $1,355,837.00;

5. The Commission shall pay to Eliot G. Disner the sum of $328,169.50 as and for his reasonable attorney's fees;

6. The Commission shall pay to Thomas M. Banks the sum of $102, 104.16 as and for his reasonable attorneys fees;

7. The Commission shall pay to the Buckleys the sum of $229,262.94 as and for costs, disbursements and expenses reasonably incurred by them;

8. The Commission shall pay to Eliot G. Disner the sum of $86,796.43 as and for costs, disbursements and expenses reasonably incurred by him for John Buckley;

[Text Deleted In Original]

10. The Commission shall pay to Peggy Ann Buckley the sum of $85,161.73 as and for costs, disbursements and expenses reasonably incurred by her.

IT IS SO ORDERED.

Dated: JUL 12 1995

/s/ William Huss
Judge of the Superior Court

APPENDIX I

Certification Form for Local Government to Use for Single-family Development Permits Only in Areas Designated by the Commission

On October 24, 1989 Peggy Ann Buckley applied for a permit to construct a single-family residential development on an existing vacant (as of January 24, 1980) parcel located at 6815 Dume Dr., Malibu which is within an area designated by the California Coastal Commission pursuant to Section 30610.1 of the Public Resources Code.

Pursuant to Section 30610.2 of the Public Resources Code the County of Los Angeles has determined that the construction of this single-family residence meets all of the following lot criteria:

[X] (1) The construction of the single-family residence on the lot is not located between the first public road and the sea or immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach.

(Please attach a copy of Commission's 8½" x 11" quad map showing location of parcel within designated area.)

[X] (2) (a) The lot is a legal lot pursuant to Section 702.1A of Ordinance No. 1494 as of January 1, 1980.

(b) The lot also conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances. (Please attach a copy or statement

referencing the applicab[illegible] general plan.)

[X] (3) The construction of the single-family residence on the lot is not located within an area known to the County of Los Angeles, or designated by any other public agency, as a geologic hazard area or as a flood hazard area. *OR* although the lot is located within an area recognized as a geologic hazard area by ___ (or flood hazard area by ___) it has been determined by County of Los Angeles to be a safe site for the construction of a single-family residence.

[X] (4) The construction of the single-family residence on the lot, located at 6815 Dume Dr., is no more than 250 feet from an existing improved road that meets minimum County requirements for fire and emergency vehicular use throughout the year.

[X] (5) The residence can be served by an adequate water supply that is legally available for use (by means of a well) *OR* (by means of a connection to a water system with sufficient capacity to serve such lot and no such connection will require the extension of an existing water main which has the capacity of serving four or more additional single-family residential structures).

Therefore, Los Angeles County hereby certifies that 6815 Dume Dr. lot and proposed single-family residence meets

the requirements of Section 30610.1(c) of Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act.

/s/ Rose C. Hamilton	10-24-89
(Signed)	(Dated)

APPENDIX J

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 WEST BROADWAY, SUITE 380
LONG BEACH, CA 90802
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

Date: March 26, 1991

Property Location:
6815 Dume Dr. Malibu, Los Angeles County.

Violation File Number: V-5-MAL-91-025

NAME John and Peggy Buckley
ADDRESS 6815 Dume Dr
CITY ZIP Malibu 90265

Dear Mr. and Mrs. Buckley:

You are hereby notified to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation carries with it certain monetary penalties. Pursuant to Section 30820 of the Act, a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that

in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend at our office if you have any questions regarding this matter.

Sincerely,

/s/ Teresa Henry for
Pam Emerson
Enforcement Supervisor

XX:PE
0007V

STATE OF CALIFORNIA - THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 WEST BROADWAY, STE 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

Date: June 11, 1991

Property Location:
6815 Dune [sic] Dr. Malibu, Los Angeles County.

Violation File Number: V-5-MAL-91-025

NAME John and Peggy Ann Buckley
ADDRESS 6815 Dume Dr
CITY ZIP Malibu 90265

Dear Mr. and Mrs. Buckley:

You are hereby notified to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation carries with it certain monetary penalties. Pursuant to Section 30820 of the Act, a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5000) per day for each day in which such violation occurs.

Please contact Barbara Carey at our office if you have any questions regarding this matter.

Sincerely,

/s/ Teresa Henry for
Pam Emerson
Enforcement Supervisor

MS:PE
3562C

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 W. BROADWAY, STE. 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

DATE 12/5/91

Property Location: 6815 Dume Drive

Violation File Number: V-5-MAL-91-025

Ms. Peggy Ann Buckley
6815 Dume Drive
Malibu, CA

Dear Ms. Buckley:

You are hereby notified to stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation may carry with it certain monetary penalties. Section 30820 of the Act provides that a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821

states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousands dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend or Pam Emerson at our office if you have any questions regarding this matter.

Sincerely,

/s/ Pam Emerson
Pam Emerson
Enforcement Supervisor

Enforcement Officer

1147:PE/025_V

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 W. BROADWAY, STE. 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

DATE 12/5/91

Property Location: 6815 Dume Drive

Violation File Number: V-5-MAL-91-025.

Contractor,

John Doe 1---XX

Ms. Peggy Ann Buckley
6815 Dume Drive
Malibu, CA

Dear Contractor or other worker:

You are hereby notified to stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation may carry with it certain monetary penalties. Section 30820 of the Act provides that a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousands dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend or Pam Emerson at our office if you have any questions regarding this matter.

Sincerely,

/s/ Pam Emerson
Pam Emerson
Enforcement Supervisor

Enforcement Officer

1147:PE/025_V

APPENDIX K

Calif. Public Resources Code

§ 30610.1. Single family residence construction; criteria

(a) Prior to certification of the applicable local coastal program, no coastal development permit shall be required for the construction of a single-family residence on any vacant lot meeting the criteria set forth in subdivision (c) and located in a specified area designated by the commission pursuant to subdivision (b).

(b) Within 60 days from the effective date of this section, the commission shall designate specific areas in the coastal zone where the construction of a single-family residence on a vacant lot meeting the criteria set forth in subdivision (c) shall not require a coastal development permit. Areas shall be designated for the exclusion provided for in this section if construction of single-family residences within the area to be designated has no potential, either individually or cumulatively, for significant adverse impacts on highly scenic resources of public importance, on environmentally sensitive areas, on prime agricultural land or on agricultural lands currently in production, or on public access to or along the coast.

In addition, if septic tanks will be required or used, an area identified as having septic tank problems by the appropriate regional water quality control board or the State Water Resources Control Board in an approved basin plan or by other formal action of such board may not be designated for exclusion pursuant to this section.

(c) Within areas designated pursuant to subdivision (b), no coastal development permit shall be required for

the construction of a single-family residence on any vacant lot which meets all of the following criteria:

(1) It is not located between the first public road and the sea or immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach.

(2) Is a legal lot as of the effective date of this section and conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances.

(3) Is not located within an area known to the affected local government, or designated by any other public agency, as a geologic hazard area or as a flood hazard area, or, if located within such an area, it has been determined by the affected local government to be a safe site for the construction of a single-family residence.

(4) Is no more than 250 feet from an existing improved road adequate for use throughout the year.

(5) Can be served by an adequate water supply that is legally available for use either by means of a well or by means of a connection to a water system with sufficient capacity to serve such lot or lots; provided, that no such connection shall require the extension of an existing water main which would have the capacity of serving four or more additional single-family residential structures.

(d) The commission shall, within 120 days from the effective date of this section, specify uniform criteria that shall be used to determine the location of "the first public

road" and the inland extent of any beach for purposes of paragraph (1) of subdivision (c).

(e) Within 30 days after the 120-day period specified in subdivision (b), the commission shall report to the Legislature and the Governor what has been done to carry out the provisions of this section.

(f) The provisions of this section shall apply notwithstanding any other provision of this division to the contrary.

Calif. Public Resources Code

§ 30610.2. Single family residence construction; certification of exemption

(a) Any person wishing to construct a single-family residence on a vacant lot within an area designated by the commission pursuant to subdivision (b) of Section 30610.1 shall, prior to the commencement of construction, secure from the local government with jurisdiction over the lot in question a written certification or determination that the lot meets the criteria specified in subdivision (c) of section 30610.1 and is therefore exempt from the coastal development permit requirements of this division. A copy of every certification of exemption shall be sent by the issuing local government to the commission within five working days after it is issued.

(b) If the commission does not designate the areas within the coastal zone as required by subdivision (b) of

section 30610.1 within the 60 days specified therein, a local government may make the certification authorized by subdivision (a) of this section without regard to the requirements of subdivision (b) of section 30610.1.